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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1270~~ 88

DARWIN CHARLES BROWN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	21
Appendix A—Statutes	1a
B—Opinions and Judgment Below	1b
C—Indictments	1c

CITATIONS

CASES:

Abbott v. *Circuit Court of Pima County*, 86 Ariz. 309, 345 P. 2d 776 (1959) 10
Attorney General v. *Pelletier*, 240 Mass. 264, 134 N.E. 407 (1922) 10
Bain, Ex parte, 121 U.S. 1 (1887) 11, 13
Berger v. *United States*, 295 U.S. 78 (1935) 18, 21
Brady v. *Maryland*, 373 U.S. 83 (1963) 18, 21
Canella v. *United States*, 157 F. 2d 470 (9th Cir. 1946) 16
Daily v. *United States*, 282 F. 2d 818 (9th Cir. 1960) .. 16
Dennis v. *United States*, 384 U.S. 855 (1966) 11
Kotteakos v. *United States*, 328 U.S. 750 (1946) 15, 16
Marsh v. *United States*, 344 F. 2d 317 (5th Cir. 1965) .. 14
Napue v. *Illinois*, 360 U.S. 264 (1959) 21
Nordlinger v. *United States*, 24 App. D.C. 406 (1904) .. 9
Palmer v. *United States*, 229 F. 2d 861, 867 (10th Cir. 1955) 17
Pittsburgh Plate Glass Co. v. *United States*, 360 U.S. 395 (1959) 11
Reiss v. *United States*, 324 F. 2d 680 (1st Cir. 1963) .. 21
Rocha v. *United States*, 288 F. 2d 545 (9th Cir. 1961) .. 16

Page

Russell v. *United States*, 369 U.S. 749 (1962) 11, 13, 14
Stirone v. *United States*, 361 U.S. 212 (1960) 9, 13
United States v. *Agueci*, 310 F. 2d 817 (2d Cir. 1962) .. 16
United States v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964) .. 8
United States v. *Brown*, 36 F.R.D. 207 (1964) 17
United States v. *Cashin*, 281 F. 2d 669 (2d Cir. 1960) .. 18
United States v. *Comyns*, 248 U.S. 349 (1919) 13
United States v. *Costello*, 350 U.S. 359 (1956) 7
United States v. *Critchley*, 353 F. 2d 358 (3d Cir. 1965) 14
United States v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961) .. 17
United States v. *Gaston*, 37 F.R.D. 476 (D.D.C. 1965) .. 17
United States v. *Greenberg*, 30 F.R.D. 164 (S.D.N.Y. 1962) 18
United States v. *Heap*, 345 F. 2d 170 (2d Cir. 1965) ... 8
United States v. *Hughes*, 195 F. Supp. 795 (S.D.N.Y. 1961) 18
United States v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965) 17
United States v. *Russano*, 257 F. 2d (2d Cir. 1958) 16
United States v. *Smith*, 16 F.R.D. 372 (W.D. Mo. 1954) 13
United States v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958) 21
United States v. *Spector*, 326 F. 2d 345 (7th Cir. 1963) 13
United States v. *Umans*, 368 F. 2d 725 (1966), *cert. granted sub nom Umans* v. *United States*, 35 U.S.L. Week 3303 (Feb. 28, 1967) 7, 8, 9, 10
United States v. *United States District Court for the Southern District of West Virginia*, 238 F. 2d 713, 721 (4th Cir. 1956), *cert. denied sub nom Valley Bell Dairy Co., Inc.* v. *United States*, 352 U.S. 981 (1957) 10
United States v. *Universal CIT Credit Corp.*, 344 U.S. 218 (1952) 8
Wood v. *Georgia*, 370 U.S. 375, 390 (1962) 8

STATUTES:

28 U.S.C. § 1254(1) 2
15 U.S.C. § 77q(a) 3, 4, 7, 11, 17, 18
18 U.S.C. § 371 .....3, 4, 17
18 U.S.C. § 1342 18
United States Constitution, Amendment V 3, 9

MISCELLANEOUS: Page

Prosecutor's Bias—An Occupational Disease, 2 Ala. L. Rev. 40 (1958) 10

The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 Colum. L. Rev. 946 (1954) 10

62 Harv. L. Rev. 1234, 1235 (1949) 10

The Grand Jury, 30 U. Kan. City L. Rev., 149, 183 n. 166 (1962) 10

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Darwin Charles Brown, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of conviction entered by the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinions of the district court on pre-trial motions, reported at 36 F.R.D. 204 and 36 F.R.D. 207 (D.D.C. 1964), are printed in Appendix B to this petition. (App. 1b to 7b). The opinion of the district court on post-trial motions, not reported, is printed in the appendix. (App. 8b-14b). The Court of Appeals affirmed without opinion; its judgment is printed in the appendix (App. 15b) as are the orders denying rehearing (App. 16b).

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966. A timely petition for rehearing (or alternatively rehearing *en banc*) was denied on February 15, 1967. On March 5, 1967, Justice Brennan entered an order extending the time for filing a petition for certiorari to and including April 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment is sufficient if the only evidence before the Grand Jury is the hearsay testimony of a government agent and the transcripts of testimony before a prior grand jury? And, if not, whether the trial court must examine the grand jury minutes to determine the indictment's sufficiency?

2. Whether, consistent with the right of an accused to be indicted by a Grand Jury, the government may utilize a Bill of Particulars to name as co-conspirators three persons whom the Grand Jury deliberately excluded from the conspiracy charged?

3. Whether the trial court must instruct the jury concerning the number of conspiracies and schemes proved when the prosecution asserts the existence of a single conspiracy and scheme but the proof at trial supports a finding of separate agreements between different persons over different periods of time?

4. Whether an accused is deprived of a fair trial when the single offense with which he is charged is fragmented into ten separate counts in the indictment?

5. Whether, consistent with the standards required in federal prosecutions, a prosecutor may elicit testimony on direct examination totally inconsistent with the witnesses' pre-trial testimony to government investigators and then after the witnesses on cross-examination have recanted their direct examination, rely in summation solely on such repudiated direct testimony?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ."

The pertinent text of Title 15 U.S.C. § 77q(a) and 18 U.S.C. § 371 is set forth in Appendix A to this petition (App. 1a).

STATEMENT

Petitioner, Darwin Charles Brown, a member of the Bar of California for twenty-eight years, was acquitted on five and convicted upon six of eleven counts on which he had been indicted, charging violations of the Securities and Exchange Act of 1933, 15 U.S.C. § 77q (a), and conspiracy under 18 U.S.C. § 371. The verdict followed a four-week jury trial in the United States District Court for the District of Columbia. Petitioner was sentenced to four months to one year and a day's imprisonment on each count, the sentences to run concurrently, and to a fine of $5,000 on the conspiracy count. With the exception of the fine, the sentence was suspended.

Between 1959 and 1961, the period covered by the indictment, petitioner had an active law practice (Tr. 2563-69),[1] specializing in Securities and Exchange Commission and corporate matters. The present indictment, which superseded and consolidated the two separate indictments originally returned by the first grand jury which considered this case, was voted in a single day by a second grand jury which had available to it transcripts from the prior grand jury and heard testimony from one witness. (See pp. 7-9, *infra*.) The present indictment contains eleven counts, each of which names petitioner, M. Thomas Kent and Ralph Whitmore as defendants. The first nine counts charge participation in a fraudulent scheme in the offer and sale of the stock of Inter-American Timber Corpora-

[1] All Tr. references, unless otherwise indicated, are to the trial transcript. As no full printed appendix was filed in the Court of Appeals below, the original transcript has been filed in the Supreme Court.

tion, an American corporation engaged in the development and exploitation of timber properties in Surinam. Count ten charges a similar scheme in connection with the offer and sale of stock of Venezuela Mines, Inc., an American corporation founded to develop mineral concessions in Venezuela. Count eleven charges a conspiracy to defraud in connection with the sale of stock in both corporations.

Inter-American Timber Corporation

In 1959, petitioner was counsel to George Stanford, a broker-dealer (Tr. 617). Ralph Whitmore, who worked for Stanford as a securities salesman, told his employer that a company headed by one Joseph Harris held rights to large tracts of timber in Surinam and that Harris desired to obtain financing to develop them. (Tr. 23, 24, 304). Harris furnished Whitmore and Stanford a brochure outlining his company's holdings, including 125,000 acres of timber under concession or in reserve (Tr. 309-310). Stanford then sought petitioner's legal advice in connection with the proposed financing. (Tr. 620). Between December 30, 1959, and April 15, 1960, Whitmore sold to three persons a total of $12,500 worth of pre-incorporated shares of Inter-American Timber Company at $1 a share. (Tr. 352, 537-39, 727, 1441-42).

Petitioner, with Harris' assistance, prepared three virtually identical versions of a written proposal for use in connection with negotiations to obtain financing for the project. (Tr. 1151, 1196-97). The government's allegations of fraud were premised largely on the statement in these brochures that 125,000 acres of timber was available if financing were obtained, and that this timber was worth over $9 million. (App.

24c.) When the negotiations to obtain financing proved fruitless, the project was abandoned and by June 1960, the company was dormant. (Tr. 2644-46). For petitioner's services in this connection, his law firm received a fee of $2,500, together with 100,000 shares of Inter-American stock which were never sold. *(Id.)*

Venezuela Mines, Inc.

In 1954, M. Thomas Kent met and worked with one Robert Taube who held diamond and gold concessions along Venezuelan rivers. (*See, e.g.,* Tr. 1886, 2067-70). Early attempts to obtain financing for the development of these properties failed, but further explorations by a co-owner and geologist, James P. Hea, led to reactivation of the project in 1960. (Tr. 2083-84). After Kent, Hea and Taube met in New York with one Russell Bryan, a consulting mining engineer (Tr. 1734), Kent retained petitioner to act as counsel for a company to be formed to secure the needed funds. The Company was incorporated in August, 1960. (Tr. 2644, 2648-49).

Whitmore agreed to attempt to raise capital for the venture, and ultimately secured a single $5,000 capital contribution from one investor. (Tr. 467). In December 1960, at a meeting in Caracas, Taube's mineral concessions were merged into the American corporation, in return for stock. (See *e.g.,* Tr. 485, 976, 1927, 2659-61).

When the necessary additional financing for the project could not be obtained, however, the company became dormant. In addition to his net $750 fee from Kent and Taube, petitioner's law firm received 250,000 shares of Venezuela Mines stock, none of which was ever sold. (Tr. 2664).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' affirmance of the trial court's refusal to inspect *in camera* the minutes of the grand jury which indicted petitioner stretches to its limits the rule that federal courts need not look behind an indictment which is, on its face, valid. *United States* v. *Costello,* 350 U.S. 359 (1956). The *Costello* rule relied on by the government in opposing petitioner's inspection motion, (Official Transcript of proceedings, *Motions,* Nov. 6, 1964 at 5) and by the trial court in denying it (App. 9b), is now under reconsideration by this Court in *Umans* v. *United States,* No. 967 (*cert. granted* 35 U.S. L. Week 3303 (Feb. 28, 1967)). Petitioner sought inspection of the grand jury minutes here to determine whether there was, in fact, *any* evidence considered by the grand jury other than a hearsay summary by a Government agent. In light of this Court's reconsideration of *Costello,* these facts raise an important issue: what showing of insufficiency of evidence must be made in order to obtain an inspection of the grand jury minutes?

This case had a peculiar genesis. In early March, 1964, Indictment No. 208-64 charged petitioner and Ralph Whitmore with conspiracy and nine counts of fraud (15 U.S.C. § 77q(a)) arising from the sale of Inter-American Timber securities. Later the same month, indictment No. 228-64 charged petitioner, Whitmore and M. Thomas Kent with conspiracy and one count of fraud (15 U.S.C. § 77q(a)) involving the sale of Venezuela Mines securities. Both indictments were returned by the same grand jury, under the aegis of the same prosecutor, and after hearing extensive testimony. In August 1964, the indictment from which this petition arises, No. 785-64, was returned by a *dif-*

ferent grand jury, presided over by a *different* prosecutor, and was presented after only one day of consideration and after petitioner's trial counsel had noted his objection to consolidation of the two original indictments for a single trial. (Official Transcript of Proceedings, November 6, 1964, *Motions,* pp. 6-7). At the hearing on petitioner's inspection motion, the prosecutor revealed that transcripts of the testimony before the prior grand jury were in the room with the second grand jury and that only one live witness had testified. (*Id.* at 16). While that witness was never identified, the government, in the opportunities given it, (Official Transcript of Proceedings Nov. 6, 1964, *Motions,* at 15-16, and Government-Appellee's Brief on Appeal, No. 19,460, at 50), has never denied that it was a government attorney or investigator.

Although the Motions Court disapproved ". . . the practice of presenting transcripts of testimony before one grand jury to another grand jury . . ." (Official Transcript of Proceedings, November 6, 1964, *Motions,* p. 16) it denied petitioner's motion for inspection. This ruling served to encourage the Government's practice of disregarding the grand jury's historic function "as a primary security to the innocent against hasty, malicious and oppressive prosecution," (*Wood* v. *Georgia,* 370 U.S. 375, 390 (1962)), viewing it instead, as simply an extension of the United States Attorney's Office.[2] The superseding indictment (No. 785-64), did

[2] This trend is clearly revealed, for example, in *United States* v. *Borelli,* 336 F. 2d 376 (2d Cir. 1964), and *United States* v. *Heap,* 345 F. 2d 170 (2d Cir. 1965). *See:* the analysis in Petition for Certiorari, *Umans* v. *United States,* No. 967 (October Term, 1966), pp. 8-10.

nothing more than combine the two earlier indictments, Nos. 208-64 and 228-64,[3] and in doing so, even carried forward into Overt Act 18 of the instant indictment the following misprint:

> "18. On or about March 25, 1961, the defendant Darwin Charles Brown mailed and caused to be mailed a letter . . . to Mr. Weston Bouret, Utah Construction & Mining Co., 550 California Street, *San Francisco 4, San Francisco (sic).*" (Emphasis supplied, App. 37c.)

The identical language, including "San Francisco 4, San Francisco," had been used to charge the commission of an overt act under indictment No. 228-64. (App. 20c.)

The Fifth Amendment provides that a defendant is entitled to the full protection of grand jury procedures before he can be brought to trial. This includes the guarantee that it act ". . . independently of either prosecuting attorney or judge." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). There is enough in this record to infer that the re-indictment was nothing more than a summary by the Government of the evidence before the first grand jury, a summary so cursory that even typographical errors went uncorrected. A new grand jury should have considered the case *de novo.*

The Court of Appeals for the District of Columbia strongly implied many years ago that a new indictment may not be returned without hearing witnesses. *Nordlinger* v. *United States,* 24 App. D.C. 406 (1904). Even the Second Circuit's opinion in *United States* v. *Umans,* 368 F. 2d 725 (1966), *cert. granted,* 35 U.S.L.

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[3] All three indictments are reproduced in Appendix C, No. 208-64 at App. 1c-14c, No. 228-64 at App. 15c-20c and the superseding No. 785-64 at App. 21c-37c.

Week 3303 (Feb. 28, 1967), which found no error in the trial judge's refusal to inspect the grand jury minutes, observes:

> ". . . we think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent." 368 F. 2d at 730.

Other courts have held that, while it may not be improper for Government counsel to summarize "for the benefit of the grand jury *the evidence that has been heard,*" (*United States* v. *United States District Court for the Southern District of West Virginia,* 238 F. 2d 713, 721 (4th Cir. 1956), *cert. denied sub nom Valley Bell Dairy Co., Inc.* v. *United States,* 352 U.S. 981 (1957) (emphasis supplied)), it is decidedly improper for Government counsel to summarize evidence which has *not* been heard. The Massachusetts Supreme Court has stated, for example:

> "For the District Attorney to make such statement is to substitute his memory for recollection of the grand jurors and is to that extent to usurp their function." *Attorney General* v. *Pelletier,* 240 Mass. 264, 310, 134 N.E. 407, 420 (1922). *Accord: Abbott* v. *Circuit Court of Pima County,* 86 Ariz. 309, 313, 345 P. 2d 776, 778 (1959).[4]

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[4] Prosecutors, as representatives of a party to the proceedings, can hardly hope to be impartial during the grand jury's deliberations. See: *Prosecutor's Bias—An Occupational Disease,* 2 Ala. L. Rev. 40 (1958); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case,* 54 Colum. L. Rev. 946 (1954); and 62 Harv. L. Rev. 1234, 1235 (1949), quoted with approval in *The Grand Jury,* 30 U. Kan. City L. Rev. 149, 183, n. 166 (1962).

No compelling considerations exist here to maintain grand jury secrecy. The standards of *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959) and *Dennis* v. *United States,* 384 U.S. 855 (1966), are clearly met by the existing strong suggestions apparent in this record that the Grand Jury which indicted the petitioner was far from independent or unbiased, but was rather little more than the ever-lengthening arm of the prosecutor's office.

2. The petitioner was further deprived of his constitutional right to be tried on an indictment of a grand jury because the government's bill of particulars and its proof at trial asserted the existence of a conspiracy which the grand jury deliberately failed to charge. Because the usual federal conspiracy charge is that the defendants conspired "with persons unknown," and because the government can and usually does particularize in its bill these "persons unknown", this Court should decide when such particularization becomes an impermissible amendment of the conspiracy count of an indictment, and when proof at trial, based on these particulars, results in a prejudicial variance from the charges returned by the Grand Jury. For, when an improper amendment occurs, the trial court is deprived of jurisdiction over the conspiracy charged (*Ex parte Bain,* 121 U.S. 1, 13 (1887), and *Russell* v. *United States,* 369 U.S. 749, 770-72 (1962)), and any conviction obtained must be reversed.

The superseding indictment, like its predecessors, charged that the petitioner, Whitmore and Kent conspired together and *only* ". . . with other persons to the Grand Jury *unknown* . . ." (emphasis supplied) to violate 15 U.S.C. § 77q(a). (App. 34c.) The government purported to identify these persons "unknown"

by naming in its bill of particulars three additional co-conspirators: Joseph Harris, owner of the Surinam timber concessions, and Robert L. Taube and James P. Hea, owners of the diamond and gold properties in Venezuela. Not one of these three was charged by either grand jury which considered this case. All three were known to both grand juries.[5]

If either grand jury had wanted to charge the petitioner with engaging in a conspiracy which included Hea, Taube, and Harris, two devices were available: the three men could have been named specifically as co-conspirators, indicted or unindicted, or the indictment could have asserted that petitioner, Whitmore and Kent conspired together and with "other persons to the Grand Jury *known* and unknown." The fact that neither device was used can only be construed as a deliberate decision by the grand jury to exclude Harris, Taube and Hea from the conspiracy charged.

The alteration of the Grand Jury's charges enabled the Government to bind petitioner by the statements, admissions and deeds of these three men. Petitioner thus not only found himself standing trial on a conspiracy charge essentially different from that alleged by the Grand Jury but also became bound by some of the most damning acts and admissions introduced into evidence: those of Harris.

When Harris testified, the jury was made aware that he was an alleged co-conspirator of the petitioner. (Tr.

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[5] Taube is specifically mentioned in Overt Act 12 of the Indictment, and petitioner's own grand jury testimony reveals extensive testimony concerning Harris (see, *e.g.*, Vol. 1, pp. 42-44, 59, 63, 65-66; Vol. II, pp. 48-49, 62-65), and Hea (see, *e.g.*, Vol. II, pp. 10-11, 13, 19, 33-35) as well as Taube (see, *e.g.*, Vol. II, pp. 4-6, 10, 17-20).

1323, 3247). Moreover, Harris admitted that a fatal telegram he sent out concerning millions of dollars of orders for cut timber was false (Tr. 837). The prosecutor spoke of Harris' statements as "admissions," (Tr. 3112) and, in enumerating those persons who had knowledge of the telegram's falsity, listed "*Harris,* Whitmore, Brown and Kent." (Tr. 3123, emphasis supplied.)

To uphold a conviction based on charges not asserted in the indictment emasculates the Fifth Amendment guarantee of indictment by a grand jury. No court may make such a change. Thus, in *Ex Parte Bain,* 121 U.S. 1 (1887), this Court found that the trial judge's action in striking certain words from the indictment resulted in trial and conviction on charges essentially different from those returned by the grand jury, and reversed Bain's conviction. In *Stirone* v. *United States,* 361 U.S. 212 (1960), the trial court's charge to the jury was found to have effected an amendment to the indictment, and again the conviction was struck down.

It is equally clear that the Government may not use a bill of particulars to amend or to shore up a defective indictment. *United States* v. *Comyns,* 248 U.S. 349 (1919), holds that a bill of particulars cannot be considered in determining whether an indictment is valid. *Accord: United States* v. *Smith,* 16 F.R.D. 372, 374 (W.D. Mo. 1954) (Opinion by Justice Whittaker); *United States* v. *Spector,* 326 F. 2d 345, 347 (7th Cir. 1963). The rule of *Russell* v. *United States, supra,* is that an unconstitutionally vague indictment cannot be cured by a bill of particulars:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of

> the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. *For a defendant could then be convicted on the basis of facts not found by . . . the grand jury which indicted him.*" 369 U.S. at 770. (Emphasis supplied.)

The danger feared by the *Russell* court was realized in petitioner's trial below: he was convicted of involvement in a conspiracy on the basis of facts specifically rejected by the grand jury which indicted him.

Recently two circuits have warned against non-grand jury amendments of indictments. In *United States* v. *Critchley,* 353 F. 2d 358 (3rd Cir. 1965), a conviction was reversed because, *inter alia,* trial proof of the time the offenses were allegedly committed centered around dates set forth only in the bill of particulars. The Third Circuit pointed out that a bill of particulars:

> ". . . can neither add to nor subtract from the indictment nor change the crime charged. [Citing cases.] To allow the Government to prove threats made prior to the dates listed in the indictment on the strength of a bill of particulars would be tantamount to permitting the indictment to be amended by the bill. An indictment may not be amended except by resubmission to the grand jury." *Id.* at 362.

The appeal in *Marsh* v. *United States,* 344 F. 2d 317 (5th Cir. 1965), centered around the defendant's claim that the trial court's action in striking the words "and other . . ." from the indictment constituted an impermissible amendment. Although the Fifth Circuit up-

held the trial judge's action, Judge Rives, speaking for the Court, took the opportunity to point out:

> "In the present case, if, instead of striking the words 'and other,' the amendment had added those words so as to *increase* the number of offenses charged, clearly the amendment would be prejudicial to the defendants and not 'merely a matter of form.'" *Id.* at 322 (Emphasis supplied).

Petitioner sustained such prejudice.

3. Because of proof at trial and the peculiar origin of the indictment here, (see pp. 7-9, *supra*), petitioner, relying on *Kotteakos* v. *United States,* 328 U.S. 750 (1946), requested the trial judge to permit the jury to decide whether the evidence supported the charge that he was engaged in a single conspiracy and a single scheme to defraud. (Tr. 3315) The refusal of these requests is contrary to this Court's ruling in *Kotteakos,* and presents the vital question of how this ruling is to be implemented in a trial court's jury instructions.

The original indictments returned in this case, Nos. 208-64 and 228-64, charged separate conspiracies and separate schemes to defraud: one conspiracy and scheme in connection with Inter-American Timber Corporation; one, in connection with Venezuela Mines, Inc. (App. 1c-20c.) The second grand jury, however, after hasty deliberation, (*See:* p. 8, *supra*) made an essentially different charge: a single scheme, a single encompassing conspiracy.

Proof at trial supported a finding of separate ventures, at widely separate locations, during separate periods of time, conducted by different groups of persons. The Inter-American project was operational between December 1959 and June 1960, and was located

in Surinam. (See, *e.g.*, Tr. 727, 2635, 2644-46). The Venezuela Mines promotion in Venezuela on the other hand, did not get under way until the company was incorporated in August, 1960, funds were not sought until October, 1960, and the underlying mineral concessions were not acquired until December 1960 (See, *e.g.*, Tr. 485, 964-65, 976, 2644). Moreover, while the bill of particulars charged that Harris, Taube, and Hea were co-conspirators in the single conspiracy alleged, the evidence adduced at trial failed to show any connection between Harris and the Venezuela Mines venture, or between Hea and Taube and the Inter-American project. Clearly these three men could have been parts only of separate operations, involving separate corporations.

Kotteakos, supra, holds that where an indictment charges one conspiracy, but proof at trial fails to show a unitary agreement or conspiracy among all defendants and co-conspirators, separate trials of each separate conspiracy or agreement shown are required. The *Kotteakos* ruling, although involving eight separate conspiracies tied together through a single man, has been applied even where the variance between proof and charge involved only two conspiracies. *United States* v. *Russano,* 257 F. 2d (2d Cir. 1958); *United States* v. *Agueci,* 310 F. 2d 817 (2d Cir. 1962); *Canella* v. *United States,* 157 F. 2d 470 (9th Cir. 1946); *Daily* v. *United States,* 282 F. 2d 818 (9th Cir. 1960); *Rocha* v. *United States,* 288 F. 2d 545 (9th Cir. 1961). Petitioner repeatedly sought separate trials for the separate agreements charged: he refused to consent to consolidation of the two original indictments (Official Transcript of Proceedings, *Motions,* November 6, 1964, pp. 6-7); and moved to sever the Inter-American charges from those involving Venezuela Mines both before (Motion of October 14, 1964) and during trial.

(Tr. 129-130). Even assuming that petitioner was not entitled to a severance of counts, he was, at the least, entitled to have the jury consider the number of agreements and schemes shown by the evidence. As the Second Circuit has stated: "[w]hether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." *United States* v. *Crosby*, 294 F. 2d 928, 945 (2d Cir. 1961). As petitioner's requested instructions on this point were not given, (Tr. 3315) and as the Court's charge made it abundantly clear that only one agreement and conspiracy was being asserted, (Tr. 3282-84, 3300-3304), petitioner was denied a jury trial on this essential fact.

4. The trial court's action in denying petitioner's motion to consolidate the indictment's ten substantive "scheme" counts into a single count was affirmed by the Court of Appeals. (App. 7b, 13b, 15b.) If this ruling is followed in the District of Columbia, and there is no reason to believe it will not be,[6] a defendant brought to trial for securities fraud will be forced to go to trial on a multicount indictment which, however, charges only one unlawful course of conduct.[7] De-

[6] The indictment in *United States* v. *Gaston*, Criminal No. 722-64, United States District Court for the District of Columbia (37 F.R.D. 476 (D.D.C. 1965), charged 75 substantive counts, 31 of which alleged violations of 15 U.S.C. § 77q(a). The indictment in *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965), contained twenty counts, one conspiracy in violation of 18 U.S.C. § 371, and 19 "scheme" counts in violation of 15 U.S.C. § 77q(a).

[7] The fragmented approach to a § 77q(a) indictment is also the rule in the Tenth Circuit, *Palmer* v. *United States*, 229 F. 2d 861, 867 (10th Cir. 1955). In denying petitioner's pre-trial motion to consolidate counts, Judge Holtzoff pointed out the conflict between the Second and Tenth Circuits and chose to follow the ruling of the latter. *United States* v. *Brown*, 36 F.R.D. 207, 208 (1964). (App. 7b.)

fendants facing identical charges in the Second Circuit, on the other hand, are entitled to have separate substantive charges consolidated into a single count. *United States* v. *Hughes,* 195 F. Supp. 795 (S.D. N.Y. 1961); *United States* v. *Greenberg,* 30 F.R.D. 164 (S.D.N.Y. 1962); and *United States* v. *Cashin,* 281 F. 2d 669 (2d Cir. 1960). The multi-count indictment, of course, promotes compromise verdicts, as is clearly shown by petitioner's acquittal on five of the ten substantive counts charged here. (*See:* p. 4, *infra.*)

This Court has never ruled upon the validity of multiple substantive counts in a securities fraud case. The validity of such an indictment in mail fraud cases has been sustained because that statute, 18 U.S.C. § 1342, makes it clear that the "mailing," rather than the "scheme" is the gist of the offense. *United States* v. *Cashin, supra.* That § 77q(a) is not equally clear is amply demonstrated by the divergent approaches to it taken by the Second, Tenth, and District of Columbia Circuits.

Petitioner's right to a fair and just determination of his guilt or innocence entitled him to be charged with a single course of conduct in a single count of the indictment. *Universal CIT Credit Corp.,* 344 U.S. 218 (1952). Refusal by the Courts below to consolidate the substantive counts was predicated upon a misconception of the essence of a § 77q(a) offense. What, in fact, constitutes the gist of a § 77q(a) offense is the heart of the conflict between the circuits on this point.

5. The tactic of relying in summation on the repudiated direct testimony of key government witnesses is in direct conflict with the standards for prosecutorial conduct laid down by this Court in *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Berger* v. *United States,* 295 U.S. 78 (1935). The practice was particularly odious

here because the recantations ignored by the prosecutor were in total accord with statements given by the witnesses to government investigators prior to trial.

When George Stanford (the stockbroker who originally promoted the Inter-American venture) appeared before the S.E.C. on July 23, 1962, he testified that he never talked with the defendant Kent concerning Inter-American. (Tr. 685). At trial, however, on direct examination, Stanford testified that it was Kent who had first brought him the Inter-American project. (Tr. 618-19). On being shown his S.E.C. statements by defense counsel during cross-examination, Stanford labeled his direct testimony on this matter "erroneous." (Tr. 689). In summation, the prosecutor charged Kent with bringing the lumber scheme "to Stanford's attention." (Tr. 3107).[8]

In 1963, Harris, (President of the Surinam Timber Company which sold timber rights to the Inter-American group), testified before the S.E.C. that when he met with petitioner in Florida in February 1960, he had 25,000 acres of timber concessions, an additional 100,000 acres in reserves, and that he so informed petitioner. (Tr. 1100-01). Harris' direct testimony at trial, on the other hand, was that he had no timber concessions whatsoever during this period and that petitioner knew this at the February meeting in Florida. (Tr. 812-13, 826-27.) On cross-examination, Harris admitted his testimony before the S.E.C. (Tr. 1101) and re-affirmed that, in February, 1960, he held not only

[8] The prosecutor needed to show Kent's involvement in Inter-American, although the original indictments returned did not connect him with it, in order to support the government's contention that there was only one conspiracy. (*Cf.*: the two original conspiracies charged, App. 12c, ff., and 18c, ff., with the superseding, combined conspiracy count, App. 34c, ff.

the acreage referred to (Tr. 1270, 1279), but also a 37-acre lumber mill site. (Tr. 1293). The prosecutor summed up Harris's testimony by stating:

> ". . . in February [petitioner] had been in Miami . . . he knew at that time . . . Harris . . did not have the concessions . . ." (Tr. 3123).[9]

Russell R. Bryan, (a mining engineer who was consulted in connection with Venezuela Mines, Inc.), testified before the S.E.C. on September 17, 1962, that, in his discussions with Taube and Kent there had been no direct mention of the sale of securities. (Tr. 1731). But Bryan's testimony at trial, on both direct and redirect examination, described lengthy discussions concerning accounting practices used to evaluate mineral reserves "if stock were to be sold publicly in the United States. . ." (*See, e.g.,* Tr. 1727, 1703). On re-cross examination, Bryan admitted giving the original testimony before the S.E.C. and reiterated its truth. (Tr. 1729-31.) The prosecutor's summary of Bryan's testimony relied solely on his discredited direct testimony that he had warned Kent concerning the standards applicable to S.E.C. registrations and public sales of securities. (Tr. 3102.)[10]

No jury could avoid being confused and misled by this web of contradictions. No defendant could expect to obtain a fair determination of his guilt or innocence in the midst of it.

---

[9] The key representation the indictment alleged to be fraudulent was the assertion that the Inter-American group had a right to 125,000 acres of timber concessions in Surinam. (App. 24c).

[10] The accounting method used to evaluate mineral reserves was alleged to be a central fraudulent representation in connection with the Venezuela Mines venture. (App. 24c).

The United States Attorney has always been held to an especially high standard. *Berger* v. *United States, supra.* He must not become an "architect of a proceeding that does not comport with standards of justice." *Brady* v. *Maryland,* 373 U.S. 83, 88 (1963). *See also: Napue* v. *Illinois,* 360 U.S. 264 (1959); and *United States* v. *Spangelet,* 258 F. 2d 338 (2d Cir. 1958). These high standards should preclude a prosecutor in a federal criminal case from summing up the proof of key issues by relying exclusively on the disavowed and repudiated direct testimony of government witnesses. As the First Circuit has held:

> "... it is not only short-sighted, but improper, for the Government to argue its witness' direct testimony in disregard of obvious modifications and explanations made on cross." *Reiss* v. *United States,* 324 F. 2d 680, 685-86 (1st Cir. 1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

Statutes Involved

Securities and Exchange Act § 17(a) (Act of May 27, 1933, c. 38, 48 Stat. 84, as amended, 15 U.S.C. § 77q(a)):

> "*Fraudulent interstate transactions.*
>
> It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Act of June 25, 1948, c. 645, 62 Stat. 701, 18 U.S.C. § 371:

> "*Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

APPENDIX B

Opinion of the United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Crim. No. 785-64

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DARWIN C. BROWN

and

M. THOMAS KENT, *Defendants*.

36 F.R.D. 204

(Nov. 9, 1964)

* * * * * * * * * * *

HOLTZOFF, District Judge.

This is a motion by the defendants to dismiss an indictment on the ground that allegedly the Grand Jury, which returned it, has been illegally summoned and convened.

The defendants rely on Title 11, Section 2306 of the Code of Laws of the District of Columbia. That section is a part of a revision and recodification of the District of Columbia Code, which became law on December 23, 1963. It is substantially a reenactment of Title 11, Sections 1406, 1407 and 1408, which were contained in an earlier code. The prior code provided that whenever the United States Attorney for the District of Columbia shall certify in writing to the Chief Judge of the United States District Court, or in his absence, to the senior associate Judge—(actually, this Court does not have associate judges, as every member of this Court is a United States District Judge)—that the exigencies of the public service require it, the Chief Judge or senior associate judge may in his discretion order an additional grand jury to be summoned.

In 1946 the Federal Rules of Criminal Procedure became law. They constitute a comprehensive procedural code for criminal cases in all United States District Courts. Their adoption was a far reaching reform in the law, and an epoch making event in the history of adjective law in this country. Rule 6(a) provides that the Court shall order one or more grand juries to be summoned at such times as the public interest requires. This provision has been uniformly construed as meaning that any member of the Court may order a grand jury to be summoned. Subsection (g) of the same Rule provides that a grand jury shall serve until discharged by the Court, but that no grand jury may serve more than eighteen months.

The practice in this Court has been for a great many years that when an application is made by the Government for the impaneling of what may be informally known as a special grand jury,—because the word "special" is not a word of art,—it is ordinarily submitted to the judge presiding in Criminal Court Number 1. It must be borne in mind that this Court is a multiple-judge court consisting of fifteen judges, that at all times several of them are assigned to hold criminal courts, and that Criminal Court Number 1 supervises the grand jury. The grand jury that returned the indictment in this case was summoned by the judge presiding in Criminal Court Number 1 at the time, and not by the Chief Judge. It is claimed that since the Chief Judge did not summon it, the grand jury was illegally convened.

In 1963, as heretofore stated, the judicial part of the Code of Laws of the District of Columbia was revised, recodified, and reenacted. Section 11-2306 is substantially a reenactment of the earlier provisions that had been in existence long prior to the promulgation of the Federal Rules of Criminal Procedure. It provides that additional grand juries may be summoned by the Chief Judge or in his absence by the presiding judge. The Congressional Committee Reports concerning the 1963 revision, indicate

clearly that the Congress did not intend to make any changes in the law. Some of the phraseology was simplified and condensed and some of the section numbers were either combined or changed. The revision was largely of a purely textual nature.

[1] It is a well recognized principle of statutory construction, which the Court deems applicable to the case at bar, that insofar as a later law is merely a reenactment of an earlier statute, it will not repeal an intermediate Act that qualifies or limits the prior one. Such an intermediate Act will be deemed to remain in force, and will be construed as qualifying or modifying the new Act in the same manner as it did the earlier law.

This principle was recognized and approved by the United States Court of Appeals for the Fourth Circuit in an opinion written by Judge Parker in George v. City of Asheville, N. C., 80 F.2d 50, 56, 103 A.L.R. 568. Numerous State cases have frequently applied and approved this doctrine. Among them are decisions of the Supreme Court of Pennsylvania In re Ferguson's Estate, 325 P. 34, 189 A. 289, and Petition of Indiana County, 360 Pa. 244, 62 A.2d 3, 5; and a decision of the Supreme Court of Minnesota in State ex rel. Village of Buhl v. Borgen, 231 Minn. 317, 43 N.W.2d 95.

[2, 3] In the instant case, the Federal Rules of Criminal Procedure having changed prior law—and it must be remembered that these Rules have the effect of a statute—they will not be deemed to have been amended by a reenactment of the prior code, even though in a revised form.

This conclusion is supported in part by the fact that actually it is impossible to comply with the directions of the reenacted section, because it refers to "terms" of court. Shortly prior to the effective date of the reenactment, Congress abolished "terms" of Court.

We often speak of the intent of Congress in construing statutes. The words "intent of Congress" constitute an

elusive phrase. In connection with major legislation discussed in full in Committee Reports and debated on the floor of one or both Houses, the resulting measure does embody the actual intent of the Members of the Congress. So, too, as concerns minor measures that have been studied by Committees and the purpose of which is defined in the Committee Reports, it may be said that those few Members who actually worked on the proposals represent the majority of the membership and, therefore, the intent of Congress is a realistic concept and is readily ascertainable. The situation is somewhat different when we deal with a codification or reenactment of a prior code. In such an instance, Members of Congress must rely very largely on the work of the staff, most of which are highly efficient and conscientious. In such revisions errors may creep in, however. The term "intent of Congress" as applied to such an enactment becomes very much attenuated. This is not said with any disrespect or disparagement of the legislative branch of the Government. On the contrary, it would be impossible for the Congress to operate effectively in any different manner.

[4, 5] The Court, therefore, reaches the conclusion that the Federal Rules of Criminal Procedure must prevail over the provisions of the reenacted local code, insofar as they cover the same ground. Under the Federal Rules of Criminal Procedure any judge of a District Court is empowered to summon a grand jury. The law no longer distinguishes, as has already been stated, between regular, additional, or special grand juries. The word "special" is no longer used in any technical sense.

[6] There is another point that must be considered, namely, that the methods of issuing orders for the summoning of a grand jury and similar provisions, are intramural internal regulations for the benefit of the Court and in the interest of efficiency in the transaction of public business. They are not intended as limitations on the authority of the grand jury, and they are not jurisdictional

in any respect. This conclusion has been reached in a number of cases, among them a decision of the Fourth Circuit in Breese v. United States, 203 F. 824.

The opinion of another member of this Court, Judge Youngdahl, who arrived at an opposite result in United States v. Tiernan, has been carefully considered. Naturally, it would be preferable to follow a ruling made by a colleague. Any other course under ordinary circumstances is detrimental to orderly procedure. There are occasions, however, and this is not the first one on which judges of this Court have expressed different views on some important subject. The point presented here, although a mere technicality, is important in the sense that it may affect the validity of a number of indictments. Therefore, with due deference and respect for my brother Youngdahl, I feel impelled to reach a different conclusion.

[7, 8] Accordingly, the Court concludes that any United States District Judge is authorized to order that a grand jury be summoned in his district and that, therefore, the Grand Jury that returned the indictment in this case was legally summoned. The motion to dismiss the indictment is denied.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Crim. No. 785-64

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DARWIN CHARLES BROWN, RALPH WHITMORE and M. THOMAS KENT, *Defendants*.

36 F.R.D. 207

(Nov. 6, 1964)

* * * * * * * * * *

Thomas Wadden, Jr., Peter R. Taft, Gary Bellow, and Marshall I. Stewart, Washington, D. C., for defendants.

HOLTZOFF, District Judge.

These are motions by defendants to consolidate Counts 2 to 10 of the indictment with Count 1, and to dismiss Counts 2 to 10 as separate counts.

The indictment charges a series of fraudulent sales of securities in violation of the Securities Act of 1933, 15 U.S.C. § 77q(a). Each count charges the mailing of a different letter in connection with the perpetration of an alleged fraudulent sale. The defendants claim that the Act proscribes only a course of conduct and not individual fraudulent transactions and that, therefore, the separate counts are in effect repetitious.

While cases may be found in support of the proposition that, unlike offenses under the Mail Fraud statute, separate mailings do not constitute separate offenses in connection with violations of the Securities Act, many of them are district court decisions. While this Court has great respect for decisions of other district courts, nevertheless, it must yield to the authority of courts of appeals.

[1] There seems to be a difference of opinion between the Second and Tenth Circuits, the Second Circuit holding that only a course of conduct is proscribed by the statute, thereby constituting a single offense. This was held in United States v. Cashin, 281 F.2d 669. On the other hand, the Tenth Circuit, in Palmer v. United States, 229 F.2d 861, 867, holds the following:

> "It is well settled that each separate use of the mails in the execution of a scheme to defraud constitutes a separate offense. * * * The same rule applies to the use of the mails in a scheme to defraud in the sale of securities."

This Court will follow the Tenth Circuit.

Actually what is before the Court here is a matter of not much more significance than a debate over the proper method of drawing legal documents, because it is inconceivable to the Court that if the defendants are convicted on all of the counts they would receive consecutive sentences. It is reasonable to assume that concurrent sentences would be imposed.

[2] It is conceivable that the Government might be prejudiced if it is not permitted to set out separate counts. The defendants are not prejudiced by the present form of the indictment.

The motions to consolidate the counts are denied.

Opinion of the United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 785-64

UNITED STATES OF AMERICA

v.

DARWIN CHARLES BROWN
and
M. THOMAS KENT

MEMORANDUM AND ORDER

This case is now before the court on the following post-trial motions of defendant Brown: (1) Motion in arrest of judgment, and (2) Motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial. Each of these motions, supported by memorandum, was adopted by defendant Kent. The Government filed a memorandum in opposition to defendants' motions. Subsequent thereto, defendant Kent filed in addition a supplemental motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial.

The aforementioned motions followed defendant Brown's conviction of five substantive counts charging him with the sale of stock in interstate commerce by means of untrue statements in violation of the Securities Act of 1933, 15 U.S.C. 77q(a), and one count charging him with conspiracy, 18 U.S.C. 371, and defendant Kent's conviction of four substantive counts charging fraudulent stock sales and one count charging conspiracy.

All of the said post-trial motions were the subject of a full hearing and oral argument.

Defendants' motion in arrest of judgment is based primarily on the contention that this Court was without

jurisdiction of the offenses in that (a) the special grand jury was improperly impaneled and if properly impaneled its term had expired, and (b) the grand jury was without sufficient evidence upon which to return an indictment. The first contention was considered and rejected by another Judge of this Court prior to trial. *United States* v. *Brown,* 36 F.R.D. 204 (D.C.C. 1964). Several other Judges of this Court have similarly held in other cases.

The issue presented is whether an additional grand jury can be summoned by the Judge presiding in Criminal Court No. 1, the Chief Judge not being absent. D.C. Code Title 11, Section 2306. To this court's knowledge, there has been but one contra view expressed and that was in the case of *United States* v. *Wallace & Tiernan, Inc.,* 234 F. Supp. 780 (D.C.C. 1964), appeal docketed, No. 19154, D.C. Cir., Nov. 30, 1964. Counsel for the defendants request that action on this point be reserved pending decision of the *Tiernan* case by the United States Court of Appeals. Inasmuch, however, as this is but one of a number of points involved in the pending motions, the court feels that the interests of all concerned would be best served by determination at this time by the trial court. Defendants' request must therefore be denied.

The defendants next urge that there was insufficient evidence before the grand jury to produce a valid indictment. It is alleged that only one witness appeared in person before the grand jury which returned the indictment in this case, with, perhaps, the transcripts of prior grand jury proceedings. Accepting these contentions, *arguendo,* the motion must be denied. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States,* 350 U.S. 359, 363 (1956). Accord, *United States* v. *Aviles,* 274 F.2d 179, 190-91 (2d Cir.), cert. denied *sub nom. Genovese* v. *United States,* 362 U.S. 974 (1960). As long as there was some competent evidence

to support the charge issued by the grand jury, the indictment should not be dismissed. *United States* v. *Tane,* 329 F.2d 848 (2d Cir. 1964).

The court deems the remaining contentions of the defendants to be without merit. The motion for arrest of judgment is therefore denied.

In support of their motion for judgment of acquittal notwithstanding the verdict, defendants contend that the court erred in failing to direct a verdict for the defendants. It is urged that reasonable jurymen must necessarily have had reasonable doubts as to the defendants' guilt, since the testimony essential to the Government's case-in-chief was so thoroughly discredited. There was in a number of instances a conflict in the testimony of the witnesses, but there was adequate and competent testimony on which the jury could find a verdict of guilty. This is the function of the jury. The court finds and holds, under the principle enunciated in *Curley* v. *United States,* 81 U.S. App. D.C. 389, cert. denied, 331 U.S. 869 (1947), that the evidence was such that a reasonable man might fairly conclude guilt beyond a reasonable doubt, and that the court was therefore required to deny the motion for judgment of acquittal and submit the case to the jury. The post-trial motion for judgment of acquittal notwithstanding the verdict is therefore denied.

In the alternative, defendants pray for a new trial pursuant to Rule 33. The grounds offered begin with the court's refusal to instruct the jury that if they found two agreements or conspiracies among the defendants, rather than one as alleged, they must return a verdict of not guilty. There was but one conspiracy—namely, to defraud prospective investors in securities. The fact that more than one company's securities were involved did not make for two conspiracies. Moreover, even if there be a variance between the charge and the evidence as to the scope of the conspiracy, such variance will be ignored unless some

substantial rights of the defendants are affected. In *Kotteakos* v. *United States,* 328 U.S. 750 (1946), cited by the defendants, an instruction that there was one conspiracy was held to be prejudicial, as the jury was also instructed that the acts of one conspirator should be imputed to the other members of the conspiracy. Thus only one overt act had to be shown, whereas a separate overt act for each conspiracy would otherwise have been required. In the instant case, however, the evidence showed, and the jury found, overt acts by both defendants as to each of the projects. Both defendants were found guilty of substantive counts involving both projects. Thus, even if it is believed there were two schemes, the argument is to no avail. See *United States* v. *Benjamin,* 328 F.2d 854, 864 (2d Cir.), cert. denied *sub nom. Howard* v. *United States,* 377 U.S. 953 (1964).

It should be noted that the Court in *Kotteakos* did not overrule *Berger* v. *United States,* 295 U.S. 78 (1935), in which an indictment charging four defendants with one conspiracy was held to cover two agreements by three of the four, one conspirator being different in each proved offense. The Court in the *Kotteakos* case said the dangers of transference of guilt inherent in a mass trial did not arise in a trial of three or even five defendants, but did when thirty-six were involved. 328 U.S., at 772-74.

No other prejudice from the alleged variance is suggested, and none occurs to the court.

While in the present case there were two promotions, Inter-American Timber Corporation and Venezuela Mines, Inc., the evidence clearly showed direct or indirect participation by both defendants in material aspects of the scheme or schemes—purpose to defraud prospective purchasers of securities. The same parties participated in both, and the same contacts were approached to invest in both. The two ventures were themselves related, one corporation being organized to exploit timber concessions in

Surinam, and the other being formed to exploit gold and diamond placer mining concessions in Venezuela. Finally, the evidence showed that the two promotions overlapped in period of time. These transactions are thus clearly distinguishable from those in *United States* v. *Russano,* 257 F.2d 712 (2d Cir. 1958), cited by the defendants, wherein there was an interval of several years between the transactions, and only one party was common to both.

Next, in support of their motion for a new trial, defendants contend the court erred in its instructions on aiding and abetting, in that it did not sufficiently emphasize knowing participation in the criminal activity. At the outset it must be pointed out that no objection was made at trial to the language of the court's instructions on aiding and abetting, even though counsel were specifically asked if they had anything they would like to add. (Transcript, p. 3343.) Apart from this, it has been held that "aiding and abetting" are not such technical words as to require definition by the court as a matter of law. See, e.g., *Guon* v. *United States,* 285 F.2d 140, 142 (8th Cir. 1960). Nevertheless, this court did in fact tell the jury, with respect to participation "I stated to you, in connection with aiding and abetting, that a person would have to be participating with knowledge and with criminal intent." (Transcript, p. 3342.)

Defendants rely heavily on *United States* v. *Garguilo,* 310 F.2d 249 (2d Cir. 1962), wherein the "instructions with respect to purposive participation, although correct, were rather abstract." But the decision in that case depended completely on the "exceptional circumstances" there presented. The only evidence implicating the aider and abettor was the fact that he had been seen in the company of the principal. The Court said, "[W]hat the judge said would have been adequate, indeed excellent, in the usual trial." Id., at 254. It is interesting to note too that in the instant case the court charged, ". . . [M]ere physical

presence when the offense is committed is not enough." (Transcript, p. 3339.)

The court's instructions were also perfectly clear that a person could be found guilty of aiding and abetting only if such aiding and abetting contributed to the actual commission of a crime. (Transcript, pp. 3297-8, 3322, 3339, 3342, 3343.) While a crime must have been committed, it is not necessary that the principal be tried and convicted. *Colosacco* v. *United States,* 196 F.2d 165 (10th Cir. 1952).

Nor is it necessary that an aider and abettor be charged as such in order to be found guilty. *Nye & Nissen* v. *United States,* 168 F.2d 846, 855 (9th Cir. 1948), aff'd 336 U.S. 613 (1949). No case to the contrary has been cited and the court knows of none.

Defendants further contend that, for various reasons, they were deprived of a fair trial, thus warranting a new trial. The court finds these grounds to be without substance. Only a few comments are called for. Defendants allege that promises to witness Whitmore were improperly withheld from the jury. The existence of such promises is a mere conclusion or deduction of defense counsel. There is no evidence of any promises anticipatory of this trial. Similarly, there is no evidence that Jencks Act materials were in fact withheld by the Government. These charges would appear to have been finally disposed of by the defendants' declining the proffered testimony of the Assistant United States Attorney, Government representatives, and counsel for Whitmore, that no such promises had been made, and no Jencks material withheld. During the trial the court dealt at substantial length with the matter of Jencks material. Hearings were had without jury. Every avenue of possible discovery of any additional Jencks data was exhausted—to the extent of asking defense counsel if there could be any further suggested action.

The allegation that the Government failed to point out and explain contradictions between testimony of Govern-

ment witnesses at the trial and prior statements made during the investigation of these matters by the Government, is likewise without merit. There is no showing of concealment or absence of good faith, although the matter was fully gone into.

At the time of trial, defense counsel had access to and used many allegedly inconsistent prior statements. It is not the Government's duty to impeach its own witnesses, where it believes the material substance to be correct, and any possible inconsistencies are equally available to defense counsel. *Link* v. *United States*, 230 F.Supp. 971, 972 (E.D. Mo.), appeal dismissed mem., 287 F.2d 566 (8th Cir. 1961).

It is therefore, this 26th day of April, 1965,

ORDERED that the defendants' motion in arrest of judgment and their motion for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial, and defendant Kent's supplemental motion for judgment of acquittal notwithstanding verdict and in the alternative for new trial, be, and the same are hereby, denied.

[Signed] R. B. KEECH
Judge

Judgment of the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

No. 19,460

Criminal 785-64

DARWIN CHARLES BROWN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

[Filed Dec. 22, 1966, Nathan J. Paulson]

APPEAL FROM the United States District Court for the District of Columbia.

Before: Burger, Wright and Tamm, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: Dec. 22, 1966

Order of the United States Court of Appeals for the District of Columbia Circuit

Before: Burger, Wright and Tamm, Circuit Judges, in Chambers.

Filed Feb. 15, 1967

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam.

Order of the United States Court of Appeals for the District of Columbia Circuit

Before: Bazelon, Chief Judge; and Fahy, Danaher, Burger, Wright, McGowan, Tamm, Leventhal and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that appellant's aforesaid petition is denied.

Per Curiam.

Circuit Judge Leventhal did not participate in the foregoing order.

APPENDIX C

Indictment No. 208-64

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Special July Grand Jury Sworn in on July 2, 1963

Criminal No. 208-'64

THE UNITED STATES OF AMERICA

v.

DARWIN CHARLES BROWN,
RALPH H. WHITMORE

Grand Jury No. Original

Violation: 15 U.S.C. § 77q(a)—Fraudulent Sales of Securities; 18 U.S.C. § 371—Conspiracy.

The Grand Jury charges:

COUNT I

From on or about May 1, 1959 and continuing to on or about December 31, 1960 the defendants Darwin Charles Brown and Ralph H. Whitmore in the District of Columbia and within the jurisdiction of this Court, would and did unlawfully, wilfully and knowingly in the offer and sale of securities, namely, the pre-incorporation subscription agreements and common capital stock of Inter-American Timber Corporation, directly and indirectly, employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading and engage in transactions, practices and a course of business which would and did

operate as a fraud and deceit upon purchasers of the above-described securities, being generally that class of persons, hereinafter referred to as "investors", whom the defendants believed could be induced to invest and re-invest in said securities, and for the purpose of inducing investors and prospective investors to invest and re-invest in said securities and to obtain money and property from them, and to deceive and defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, all in the following manner:

1. On or about November 23, 1959 the defendants organized and promoted a joint venture entitled Inter-American Timber Company and on or about April 28, 1960 said defendants incorporated Inter-American Timber Corporation, a body corporate, under the laws of the District of Columbia with an authorized capital structure of 1,100,000 shares of common capital stock (both the joint venture and the corporation are hereinafter referred to as Inter-American) purportedly to "own, operate, exploit and develop timber" concessions purportedly owned by Inter-American.

2. During all of said time the defendants operated and controlled Inter-American, and from on or about April 29, 1960 to on or about June 6, 1960 the defendant Ralph H. Whitmore was the president and a director of Inter-American and the defendant Darwin Charles Brown was the secretary-treasurer, counsel and a director of Inter-American, and during all of said time the defendants singly and in concert with and with the aid and assistance of others would and did dominate, control, aid, abet, counsel and direct the affairs of Inter-American.

3. From on or about June 6, 1960 to on or about September 2, 1960 the defendants caused Inter-American to issue to the defendants 200,000 securities of Inter-American, each receiving 100,000 securities at no cost to the defendants and also would and did issue to M. Thomas Kent, 75,000 secur-

ities of Inter-American and to Joseph W. Harris, 25,000 securities of Inter-American at no cost to them or to the defendants.

4. From on or about December 1, 1959 to on or about September 7, 1960 the defendants offered, and sold approximately 39,500 Inter-American securities to investors for proceeds of approximately $26,950.00.

5. From on or about March 1, 1960 to on or about December 31, 1960 the defendants would and did devise, publish and distribute to investors and prospective investors brochures containing false and fraudulent representations and omitting to state material facts pertaining to Inter-American, well knowing at the time that said representations would be and were false and fraudulent when made, said representations and omissions including but not being limited to those set forth in paragraphs 7 and 8 herein.

6. From on or about April 11, 1960 to on or about December 31, 1960 the defendants would and did devise, publish and distribute to investors and prospective investors copies of a telegram containing false and fraudulent representations and omitting to state material facts pertaining to Surinam Timber Corporation well knowing at the time that said representations would be and were false and fraudulent when made, said representations and omissions including but not being limited to those set forth in paragraphs 7 and 8 herein.

7. To induce the investors and prospective investors to invest and re-invest in securities of Inter-American and to obtain money and property from them, and to deceive and defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, the defendants would and did make false and fraudulent representations to investors and prospective investors well knowing at the time that said representations would be and were false and fraudulent when made, including but not limited to the following:

a) that Inter-American had an asset represented by "Concessions from Government of Surinam (Right to lumber off 125,000 acres of virgin timber)".

b) that Inter-American had an asset represented by standing timber on 125,000 acres of concessions in Surinam which was valued at $9,322,940.00.

c) that Inter-American would register its securities with the Securities and Exchange Commission within various periods of time none of which exceeded 90 days.

d) that the stock of Inter-American would be offered to the public at $5.00 per share.

e) that all moneys invested in pre-incorporation agreements of Inter-American would be placed in an escrow account and would be refunded if Inter-American did not raise sufficient funds to become operative and did not register its securities with the Securities and Exchange Commission.

f) that Surinam Timber Corporation had "ACCEPTED ORDERS FOR LUMBER AND TIMBER FOR ANNUAL DELIVERY IN AMOUNTS EXCEEDING $6,800,000.00 TO BE BACKED BY IRREVOCABLE LETTERS OF CREDIT FROM TWO RESPONSIBLE FIRMS."

g) that Inter-American, Surinam Lumber Company and Surinam Timber Corporation were one and the same entity.

8. To induce the investors and prospective investors to invest and re-invest in securities of Inter-American and to obtain money and property from them, and to deceive and defraud them, and to lull the investors into a false sense of security as to the merit and value of their investment, the defendants would and did conceal and omit to state material facts which the defendants well knew at the time were necessary to be stated in order to make the statements made in the light of the circumstances under which they

were made not misleading, including but not limited to the following:

a) that defendants caused Inter-American to issue 300,000 shares of its common capital stock to the defendants and others at no cost to any of them.

b) that money obtained from the sale of securities of Inter-American was being appropriated by the defendants to their own use and benefit.

9. On or about December 30, 1959 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to William J. Troup, Jr. in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said William J. Troup, Jr., said use of the mails being as follows:

the defendants caused William J. Troup, Jr. to place in an authorized depository for mail matter in Coral Gables, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT II

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about January 19, 1960 the defendants would and did in the District of Columbia and within the jurisdiction of this court, and by the use of the mails in the offer and sale of securities of Inter-American to Donald A. Cooke in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Donald A. Cooke, said use of the mails being as follows: the defendants caused The Riggs National Bank to place in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Merrill, Lynch, Pierce, Fenner & Smith
1628 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT III

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about January 22, 1960 the defendants in the District of Columbia and within the jurisdiction of this

court, would and did by the use of the mails in the offer and sale of securities of Inter-American to J. W. Suggs in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said J. W. Suggs, said use of the mails being as follows:

the defendants caused J. W. Suggs to place in an authorized depository for mail matter in Perrine, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT IV

1. The Grand Judy re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about April 13, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to J. W. Suggs in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of ma-

terial facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said J. W. Suggs, said use of the mails being as follows:

the defendants caused J. W. Suggs to place in an authorized depository for mail matter in Perrine, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department acording to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT V

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about June 17, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said

Edgar W. Pfeiffer, said use of the mails being as follows: the defendents did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT VI

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about June 30, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statement made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT VII

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about July 25, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants caused Edgar W. Pfeiffer to place in an authorized depository for mail matter in Pensacola, Florida an envelope and contents addressed to

Mr. Ralph H. Whitmore,
R. H. Whitmore & Co., Inc.,
606 RCA Building,
1725 "K" Street, N. W.,
Washington 6, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT VIII

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about September 2, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT IX

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about September 7, 1960 the defendants in the District of Columbia and within the jurisdiction of this

court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants caused Edgar W. Pfeiffer to place in an authorized depository for mail matter in Pensacola, Florida an envelope and contents addressed to

Mr. Ralph H. Whitmore,
R. H. Whitmore & Co., Inc.,
606 RCA Building,
1725 "K" Street, N. W.,
Washington 6, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT X

From on or about May 1, 1959 and continuing to on or about December 31, 1960, the defendants Darwin Charles Brown and Ralph H. Whitmore in the District of Columbia and within the jurisdiction of this court and at other places to the Grand Jury unknown, would and did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other and with other persons to the Grand Jury unkown, to commit offenses against the United States, namely to violate Title 15, United States Code, Section 77q(a) in the manner and means set forth

in paragraphs 1 through 8 of Counts I through IX, the allegations of which paragraphs are hereby re-alleged and incorporated herein by reference.

In furtherance of the aforesaid unlawful conspiracy, and for the purpose of effecting the objects thereof, the defendants would and did commit, among others, the following overt acts in the District of Columbia and within the jurisdiction of this court:

OVERT ACTS

1. On or about January 5, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00, payable to the defendant Ralph H. Whitmore.

2. On or about January 11, 1960 defendant Darwin Charles Brown mailed and caused to be mailed a letter addressed to Joseph W. Harris, 6855 S.W. 26th Terrace, Miami, Florida.

3. On or about January 12, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $500.00 payable to the defendant Ralph H. Whitmore.

4. On or about January 19, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $500.00 payable to the defendant Ralph H. Whitmore.

5. On or about January 21, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $750.00 payable to the defendant Ralph H. Whitmore.

6. On or about January 24, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00 payable to the defendant Ralph H. Whitmore.

7. On or about January 30, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00 payable to Ginsburg, Leventhal Brown & Morrison.

8. On or about February 9, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $750.00 payable to the defendant Darwin Charles Brown.

9. On or about March 7, 1960 the defendants Charles Darwin Brown and Ralph H. Whitmore and others to the Grand Jury unknown met at the Sheraton Carlton Hotel in the District of Columbia.

10. On or about March 18, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter, together with a brochure on Inter-American, addressed to Frank Chambers, 120 Montgomery Street, San Francisco, California.

11. On or about April 21, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter, together with a copy of a telegram, addressed to Ellis E. Patterson, 11919 Lockridge Road, Studio City, California, in violation of Title 18, United States Code, Section 371.

DAVID C. ACHESON
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

Foreman.

Indictment No. 228-64

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Special July Grand Jury Sworn in on July 2, 1963

Criminal No. 228

Grand Jury No. Original

THE UNITED STATES OF AMERICA

v.

DARWIN CHARLES BROWN, RALPH H. WHITMORE,
M. THOMAS KENT

Violation: 15 U.S.C. § 77q(a)—Fraudulent Sales of Securities; 18 U.S.C. § 371—Conspiracy

The Grand Jury charges:

COUNT I

From on or about May 1, 1960 and continuing to on or about May 1, 1961 the defendants Darwin Charles Brown, Ralph H. Whitmore, and M. Thomas Kent, in the District of Columbia and within the jurisdiction of this Court would and did unlawfully, wilfully and knowingly in the offer and sale of securities, namely, the common capital stock of Venezuela Mines, Incorporated, directly and indirectly, employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon purchasers of the above-described securities,

being generally that class of persons, hereinafter referred to as "investors", whom the defendants believed could be induced to invest and re-invest in said securities, all in the following manners:

1. On or about May 1, 1960 the defendants organized and promoted a joint venture and on or about August 2, 1960 said defendants incorporated Venezuela Mines, Incorporated, a body corporate, under the laws of the District of Columbia with an authorized capital structure of 3,000,000 shares of common stock (both the joint venture and the corporation are hereinafter referred to as Venezuela Mines) purportedly to mine, explore, develop and manage gold and silver and precious stones and other deposits and properties.

2. During all of said time the defendants operated and controlled Venezuela Mines, and from on or about August 2, 1960 to on or about May 1, 1961 the defendant M. Thomas Kent was a director of Venezuela Mines and from on or about December 18, 1960 to on or about May 1, 1961 the defendant Darwin Charles Brown was chairman of the board of directors, a vice-president, and counsel of Venezuela Mines and the defendant M. Thomas Kent was a vice-president of Venezuela Mines, and during all of said time the defendants singly and in concert with and with the aid and assistance of others would and did dominate, control, aid, abet, counsel and direct the affairs of Venezuela Mines.

3. On or about February 14, 1960 the defendants caused Venezuela Mines to issue to the defendants 750,000 shares of common capital stock of Venezuela Mines, each receiving 250,000 shares at no cost to the defendants.

4. From on or about September 1, 1960 to on or about May 1, 1961 the defendants offered, and sold approximately 50,000 shares of Venezuela Mines common capital stock to the public for proceeds of approximately $5,000.00.

5. To induce the investors and prospective investors to invest and re-invest in securities of Venezuela Mines and to obtain money and property from them, and to deceive and to defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, from on or about January 1, 1961 to on or about May 1, 1961 the defendants would and did devise, publish and distribute to investors and prospective investors brochures containing false and fraudulent representations and omitting to state material facts pertaining to Venezuela Mines, well knowing at the time that said representations would be and were false and fraudulent when made, said representations and omissions including but not being limited to those set forth in paragraph 6 herein.

6. To induce the investors and prospective investors to invest and re-invest in the common capital stock of Venezuela Mines and to obtain money and proprety from them, and to deceive and defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, the defendants would and did make false and fraudulent representations to investors and prospective investors well knowing at the time that said representations would be and were false and fraudulent, when made, including but not limited to the following:

a) that Venezuela Mines would obtain valuable mineral leases worth millions of dollars.

b) that Venezuela Mines would register its common capital stock with the Securities and Exchange Commission within a short period of time.

c) that the common capital stock of Venezuela Mines would increase substantially in value in a short period of time.

d) that Venezuela Mines had assets which were valued at $109,865,183.00.

e) that Venezuela Mines had a net worth of $107,365,183.10.

7. On or about February 27, 1961 the defendants in the District of Columbia and within the jurisdiction of this Court, would and did by the use of the mails in the offer and sale of the common capital stock of Venezuela Mines, Incorporated, to Edgar W. Pfeiffer, in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows:

the defendants did place and caused to be placed in an authorized despository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Florida

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT II

From on or about May 1, 1960 and continuing to on or about May 1, 1961 the defendants Darwin Charles Brown, Ralph H. Whitmore and M. Thomas Kent in the District of Columbia and within the jurisdiction of this Court and at other places to the Grand Jury unknown, would and did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other and with other persons to the Grand Jury unknown, to comit offenses

against the United States, namely to violate Title 15, United States Code, Section 77q(a) in the manner and means set forth in paragraphs 1 through 6 of Count I, the allegations of which paragraphs are hereby realleged and incorporated herein by reference.

In furtherance of the aforesaid unlawful conspiracy, and for the purpose of effecting the objects thereof, the defendants would and did commit, among others, the following overt acts in the District of Columbia and within the the jurisdiction of this Court:

Overt Acts

1. On or about June 30, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter addressed to Mr. Robert L. Taube, Venezuela Mines, Inc., Apartado 118, Maracaibo, Venezuela.

2. On or about October 29, 1960 the defendant Ralph H. Whitmore mailed and caused to be mailed a letter addressed to Mr. Edgar W. Pfeiffer, P. O. Box 128, Pensacola, Florida.

3. On or about December 18, 1960 the defendants and others to the Grand Jury unknown met at the Tamanaco Hotel in Caracas, Venezuela.

4. On or about March 14, 1961 the defendant M. Thomas Kent ordered 100 copies of a brochure entitled Venezuela Mines Inc. to be duplicated from Campbell Photo and Printing Service Inc.

5. On or about March 21, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter together with a brochure entitled Venezuela Mines Inc. addressed to Mr. Frank Chambers, Continental Capital Corp., 120 Montgomery Street, San Francisco, California.

6. On or about March 22, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter

together with a brochure entitled Venezuela Mines Inc. addressed to Dr. Donald H. McLaughlin, President, Homestake Mining Corporation, San Francisco, California.

7. On or about March 25, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter together with a brochure entitled Venezuela Mines Inc. addressed to Mr. Weston Bouret, Utah Construction & Mining Co., 550 California Street, San Francisco 4, San Francisco [sic].

In violation of Title 18, United States Code, Section 371.

Attorney of the United States in and for the District of Columbia

A TRUE BILL:

Foreman.

Indictment No. 785-64

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Special May Grand Jury Sworn in on May 19, 1964

Criminal No. 785-64

Grand Jury No. Original

THE UNITED STATES OF AMERICA

v.

DARWIN CHARLES BROWN
RALPH H. WHITMORE
M. THOMAS KENT

Violation: 15 U.S.C. § 77q(a)—
Fraudulent Sales of Securities;
18 U.S.C. § 371—Conspiracy.

The Grand Jury charges:

COUNT I

From on or about May 1, 1959 and continuing to on or about May 1, 1961, the defendants Darwin Charles Brown, Ralph H. Witmore and M. Thomas Kent, in the District of Columbia and within the jurisdiction of this Court, would and did unlawfully, wilfully and knowingly in the offer and sale of securities, namely, the pre-incorporation subscription agreements and common stock of Inter-American Timber Corporation, and Venezuela Mines, Incorporated, directly and indirectly, employ a device, scheme and artifice to defraud, obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading and engage in transactions, practices and a course of business which would and did operate as a fraud

and deceit upon purchasers of the above-described securities, being generally that class of persons, hereinafter referred to as "investors", whom the defendants believed could be induced to invest and re-invest in said securities, and for the purpose of inducing investors and prospective investors to invest and re-invest in said securities and to obtain money and property from them, and to deceive and defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, all in the following manner:

1. On or about November 23, 1959 the defendants organized and promoted a joint venture entitled Inter-American Timber Company and on or about April 28, 1960 said defendants incorporated Inter-American Timber Corporation, a body corporate, with an authorized capital structure of 1,100,000 shares of common capital stock (both the joint venture and the corporation are hereinafter referred to as Inter-American) purportedly to "own, operate, exploit and develop timber" concessions purportedly owned by Inter-American and organized and promoted a joint venture entitled Venezuela Mines and on or about August 2, 1960 said defendants incorporated Venezuela Mines, Incorporated, a body corporate, with an authorized capital structure of 3,000,000 shares of common stock (both the joint venture and the corporation are hereinafter referred to as Venezuela Mines) purportedly to mine, explore, develop and manage gold and silver and precious stones and other deposits and properties; both Inter-American and Venezuela Mines were incorporated under the laws of the District of Columbia.

2. During all of said time the defendants operated and controlled Inter-American and Venezuela Mines and during all or part of said time the defendant Darwin Charles Brown was Secretary-Treasurer, Counsel and a Director of Inter-American, and chairman of the board of directors, a Vice-President, and Counsel of Venezuela Mines, the

defendant Ralph H. Whitmore was President and a Director of Inter-American and the defendant M. Thomas Kent was a Director of Inter-American and a Director and a Vice-President of Venezuela Mines, and during all of said time the defendants singly and in concert with and with the aid and assistance of others would and did dominate, control, aid, abet, counsel and direct the affairs of Inter-American and Venezuela Mines.

3. From on or about June 6, 1960, to on or about February 14, 1961, the defendants caused Inter-American and Venezuela Mines to issue to the defendants 275,000 securities of Inter-American and 750,000 securties of Venezuela Mines at no cost to the defendants.

4. From on or about December 1, 1959 to on or about May 1, 1961, the defendants offered, and sold approximately 44,500 securties of Inter-American and Venezuela Mines to investors for proceeds of approximately $31,950.00.

5. From on or about March 1, 1960 to on or about May 1, 1961, the defendants would and did devise, publish and distribute to investors and prospective investors brochures containing false and fraudulent representations and omitting to state material facts pertaining to Inter-American and Venezuela Mines, well knowing at the time that said representations would be and were false and fraudulent when made, said representations and omissions including but not being limited to those set forth in paragraphs 7 and 8 herein.

6. From on or about April 11, 1960 to on or about December 31, 1960, the defendants would and did devise, publish and distribute to investors and prospective investors copies of a telegram containing false and fraudulent representations and omitting to state material facts pertaining to Surinam Timber Corporation well knowing at the time that said representations would be and were false and fraudulent when made, said representations and omissions includ-

ing but not being limited to those set forth in paragraphs 7 and 8 herein.

7. To induce the investors and prospective investors to invest and reinvest in securities of Inter-American and Venezuela Mines and to obtain money and property from them, and to deceive and defraud them, and to lull investors into a false sense of security as to the merit and value of their investment, the defendants would and did make false and fraudulent representations to investors and prospective investors well knowing at the time that said representations would be and were false and fraudulent when made, including but not limited to the following:

a) that Inter-American had an asset represented by "Concessions from Government of Surinam (Right to lumber off 125,000 acres of virgin timber)".

b) that Venezuela Mines would obtain valuable mineral leases worth millions of dollars.

c) that Inter-American had an asset represented by standing timber on 125,000 acres of concessions in Surinam which was valued at $9,322,940.00.

d) that Venezuela Mines had assets which were valued at $109,865,183.00.

e) that all moneys invested in pre-incorporation agreements of Inter-American would be placed in an escrow account and would be refunded if Inter-American did not raise sufficient funds to become operative and did not register its securities with the Securities and Exchange Commission.

f) that Venezuela Mines had a net worth of $107,365,183.10.

g) that Surinam Timber Corporation had "ACCEPTED ORDERS FOR LUMBER AND TIMBER FOR ANNUAL DELIVERY IN AMOUNTS EXCEEDING $6,800,000.00 TO BE

BACKED BY IRREVOCABLE LETTERS OF CREDIT FROM TWO RESPONSIBLE FIRMS."

h) that Inter-American, Surinam Lumber Company and Surinam Timber Corporation were one and the the same entity.

i) that Inter-American would register its securities with the Securities and Exchange Commission within various periods of time none of which exceeded 90 days.

j) that Venezuela Mines would register its common capital stock with the Securities and Exchange Commission within a short period of time.

k) that the stock of Inter-American would be offered to the public at $5.00 per share .

l) that the common capital stock of Venezuela Mines would increase substantially in value in a short period of time.

8. To induce the investors and prospective investors to invest and re-invest in securities of Inter-American and Venezuela Mines and to obtain money and property from them, and to deceive and defraud them, and to lull the investors into a false sense of security as to the merit and value of their investment, the defendants would and did conceal and omit to state material facts which the defendants well knew at the time were necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading, including but not limited to the following:

a) that defendants caused Inter-American to issue 275,000 securities and caused Venezuela Mines to issue 750,000 securities to the defendants at no cost to any of them.

b) that money obtained from the sale of securities of Inter-American and Venezuela Mines was being

appropriated by the defendants to their own use and benefit.

9. On or about December 30, 1959 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to William J. Troup, Jr. in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said William J. Troup, Jr., said use of the mails being as follows: the defendants caused William J. Troup, Jr. to place in an authorized depository for mail matter in Coral Gables, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT II

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in Paragraph 9 thereof.

2. On or about January 19, 1960 the defendants would and did in the District of Columbia and within the jurisdiction of this Court, and by means and instruments of transportation and communication in interstate commerce, to wit

in the District of Columbia, in the offer and sale of securities of Inter-American to Donald A. Cooke in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Donald A. Cooke, said use of the means and instruments of transportation and communication in inter-state commerce being as follows: on or about January 19, 1960, in the District of Columbia the defendants sold and Donald A. Cooke bought securities of Inter-American in violation of Title 15, United States Code, Section 77q(a).

COUNT III

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about January 22, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sales of securities of Inter-American to J. W. Suggs in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said J. W. Suggs, said use of

the mails being as follows: the defendants caused J. W. Suggs to place in an authorized depository for mail matter in Perrine, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT IV

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about April 13, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to J. W. Suggs in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said J. W. Suggs, said use of the mails being as follows: the defendants caused J. W. Suggs to place in an authorized depository for mail matter in Perrine, Florida an envelope and contents addressed to

Inter-American Timber Company
1632 K Street, N. W.
Washington, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT V

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about June 17, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code Section 77q(a).

COUNT VI

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about June 30, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statement made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT VII

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about July 25, 1960 the defendants in the District of Columbia and within the jurisdiction of this court,

would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants caused Edgar W. Pfeiffer to place in an authorized depository for mail matter in Pensacola, Florida an envelope and contents addressed to

Mr. Ralph H. Whitmore
R. H. Whitmore & Co., Inc.,
606 RCA Building,
1725 "K" Street, N. W.,
Washington 6, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT VIII

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about September 2, 1960 the defendants in the District of Columbia and within the jurisdiction of this court would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and

obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendant did place and cause to be placed in an authorized depository for mail matter in the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Fla.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT IX

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about September 7, 1960 the defendants in the District of Columbia and within the jurisdiction of this court, would and did by the use of the mails in the offer and sale of securities of Inter-American to Edgar W. Pfeiffer in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud

and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails as follows: The defendants caused Edgar W. Pfeiffer to place in an authorized depository for mail matter in Pensacola, Florida an envelope and contents addressed to

Mr. Ralph H. Whitmore
R. H. Whitmore & Co.,Inc.,
606 RCA Building
1725 "K" Street, N. W.,
Washington 6, D. C.

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT X

1. The Grand Jury re-alleges all of the allegations of Count I of this indictment except those contained in paragraph 9 thereof.

2. On or about February 27, 1961 the defendants in the District of Columbia and within the jurisdiction of this Court, would and did by the use of the mails in the offer and sale of the common capital stock of Venezuela Mines, Incorporated, to Edgar W. Pfeiffer, in the manner and means more fully described above, unlawfully, wilfully, and knowingly, directly and indirectly, employ said device, scheme and artifice to defraud and obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and engage in transactions, practices and a course of business which would and did operate as a fraud and deceit upon investors in said securities, including said Edgar W. Pfeiffer, said use of the mails being as follows: the defendants did place and caused to be placed in an authorized depository for mail matter in

the District of Columbia an envelope and contents addressed to

Mr. Edgar W. Pfeiffer
P. O. Box 128
Pensacola, Florida

to be sent and delivered by the United States Post Office Department according to the directions thereon in violation of Title 15, United States Code, Section 77q(a).

COUNT XI

From on or about May 1, 1959 and continuing to on or about May 1, 1961 the defendants Darwin Charles Brown, Ralph H. Whitmore and M. Thomas Kent in the District of Columbia and within the jurisdiction of this Court and at other places to the Grand Jury unknown, would and did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, namely to violate Title 15, United States Code, Section 77q(a) in the manner and means set forth in paragraphs 1 through 8 of Counts I. through X, the allegations of which paragraphs are hereby realleged and incorporated herein by reference.

In furtherance of the aforesaid unlawful conspiracy, and for the purpose of effecting the objects thereof, the defendants would and did commit, among others, the following overt acts in the District of Columbia and within the jurisdiction of this Court:

OVERT ACTS

1. On or about January 5, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00, payable to the defendant Ralph H. Whitmore.

2. On or about January 11, 1960 defendant Darwin Charles Brown mailed and caused to be mailed a letter

addressed to Joseph W. Harris, 6855 S.W. 26th Terrace, Miami, Florida.

3. On or about January 12, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $500.00 payable to the defendant Ralph H. Whitmore.

4. On or about January 19, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $500.00 payable to the defendant Relph H. Whitmore.

5. On or about January 21, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $750.00 payable to the defendant Ralph H. Whitmore.

6. On or about January 24, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00 payable to the defendant Ralph H. Whitmore.

7. On or about January 30, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $2,500.00 payable to Ginsburg, Leventhal Brown & Morrison.

8. On or about February 9, 1960 the defendant Darwin Charles Brown drew a check on the account of Inter-American at the Security Bank for $750.00 payable to the defendant Darwin Charles Brown.

9. On or about March 7, 1960 the defendants Darwin Charles Brown and Ralph H. Whitmore and others to the Grand Jury unknown met at the Sheraton Carlton Hotel in the District of Columbia.

10. On or about March 18, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter, together with a brochure on Inter-American, addressed

to Frank Chambers, 120 Montgomery Street, San Francisco, California.

11. On or about April 21, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter, together with a copy of a telegram, addressed to Ellis E. Patterson, 11919 Lockridge Road, Studio City, California.

12. On or about June 30, 1960 the defendant Darwin Charles Brown mailed and caused to be mailed a letter addressed to Mr. Robert L. Taube, Venezuela Mines, Inc., Apartado 118, Maracaibo, Venezuela.

13. On or about October 29, 1960 the defendant Ralph H. Whitmore mailed and caused to be mailed a letter addressed to Mr. Edgar W. Pfeiffer, P. O. Box 128, Pensacola, Florida.

14. On or about December 18, 1960 the defendants and others to the Grand Jury unknown met at the Tamanaco Hotel in Caracas, Venezuela.

15. On or about March 21, 1961 the defendant M. Thomas Kent ordered 100 copies of a brochure entitled Venezuela Mines, Inc. to be duplicated from Campbell Photo and Printing Service Inc.

16. On or about March 21, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter together with a brochure entitled Venezuela Mines, Inc. addressed to Mr. Frank Chambers, Continental Capital Corp., 120 Montgomery Street, San Francisco, California.

17. On or about March 22, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter together with a brochure entitled Venezuela Mines, Inc. addressed to Dr. Donald H. McLaughlin, President, Homestake Mining Corporation, San Francisco, California.

18. On or about March 25, 1961 the defendant Darwin Charles Brown mailed and caused to be mailed a letter

together with a brochure entitled Venezuela Mines, Inc. addressed to Mr. Weston Bouret, Utah Construction & Mining Co., 550 California Street, San Francisco, 4, San Francisco (sic).

In violation of Title 18, United States Code, Section 371.

Attorney of the United States in and for the District of Columbia

A TRUE BILL:

Foreman.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	11
Conclusion	17

CITATIONS

Cases:

Berger v. *United States*, 295 U.S. 78 — 15
Costello v. *United States*, 350 U.S. 359 — 11
Didenti v. *United States*, 44 F. 2d 537 — 13
Dunlop v. *United States*, 165 U.S. 486 — 12
Edens v. *United States*, 239 F. Supp. 272 — 14
Fox v. *United States*, 45 F. 2d 364 — 12, 13
Katz v. *United States*, 273 Fed. 157, certiorari denied, 257 U.S. 641 — 13
Kotteakos v. *United States*, 328 U.S. 750 — 16
Leedy, Wheeler & Co., 16 S.E.C. 299 — 8
Monroe v. *United States*, 234 F. 2d 49, certiorari denied, 352 U.S. 873 — 15
Palmer v. *United States*, 229 F. 2d 861, certiorari denied, 350 U.S. 996 — 14
Prichard v. *United States*, 181 F. 2d 326, affirmed, 339 U.S. 974 — 13
Umans v. *United States*, No. 967, O.T. 1966 — 11
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959 — 16
United States v. *Benjamin*, 328 F. 2d 854, certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953 — 8, 15
United States v. *Bennett*, 36 F.R.D. 103 — 14
United States v. *Binstock*, 37 F.R.D. 13 — 14
United States v. *Cashin*, 281 F. 2d 669 — 14
United States v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U.S. 799 — 15
United States v. *Comyns*, 248 U.S. 349 — 12

Cases—Continued Page

United States v. *Greenberg*, 30 F.R.D. 164 14
United States v. *Hughes*, 195 F. Supp. 795 14
United States v. *Lefkoff*, 113 F. Supp. 551 13
United States v. *Marchisio*, 344 F. 2d 653 13
United States v. *Melekh*, 193 F. Supp. 586 12
United States v. *Universal Corp*, 344 U.S. 218 14
United States v. *Van Allen*, 28 F.R.D. 329 14

Statute:

Securities Act of 1933, § 17(a), 15 U.S.C. 77q(a) .. 2, 3, 4, 13

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 7(c) 12
Hills, *The Law of Accounting and Financial Statements*, 34–35 (1957) 8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 88

DARWIN CHARLES BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 43 Misc.

MATTHEW THOMAS KENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the conviction *per curiam* (Pet. App. 15b)[1] without opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1966 (Pet. App. 15b). A petition

[1] References designated "Pet." are to the petition in No. 88, which is adopted by the petition in No. 43 Misc. "J.A." refers to the joint appendix in the court of appeals.

for rehearing was denied on February 15, 1967. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 15, 1967. The petition in No. 88 was filed on April 14, 1967. The petition in No. 43 Misc. was filed on April 17, 1967, and is out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to inspect the minutes of the grand jury to see if the indictment, valid on its face, was supported by sufficient evidence.

2. Whether the indictment is fatally defective because it does not specifically name all of the co-conspirators.

3. Whether it was error for the trial court to refuse to consolidate the ten separate substantive counts of the indictment charging fraudulent sales of securities through the mails.

4. Whether the court's instructions to the jury concerning the number of schemes and conspiracies were proper.

5. Whether the prosecutor's summation was prejudicial.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the District of Columbia on six counts of an eleven-count indictment charging, in ten substantive counts, securities fraud violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and a single count charging conspiracy

to commit such offenses (Pet. App. 21c–37c; Tr. 3356–3358). Petitioner Brown was convicted on five substantive counts and conspiracy. Petitioner Kent was convicted on four substantive counts and conspiracy. Each was sentenced to imprisonment for a period of four months to one year and a day on all counts, to run concurrently, and fined (J.A. 71–74). Except for the fine, the sentences were suspended and each petitioner placed on probation for a period of three years. The court of appeals affirmed the convictions *per curiam* without opinion (Pet. App. 15b).

1. In March 1964, a grand jury for the United States District Court for the District of Columbia returned a ten-count indictment charging petitioner Brown and one Ralph H. Whitmore with nine separate offers to sell securities of Inter-American Timber Corporation (hereinafter "IAT") in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and conspiracy to commit such offenses (Pet. App. 1c–14c). In the same month, the same grand jury returned another indictment charging petitioner Brown, Ralph H. Whitmore and petitioner Kent (No. 43 Misc.) with a single offer to sell securities of Venezuela Mines, Inc., in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and conspiracy to commit such offense (Pet. App. 15c–20c). Subsequently, certain matters were brought to the attention of the government which indicated that the fraudulent schemes alleged in the two indictments were, in fact, one scheme aimed at the same investors during approximately the same period of time by the three defendants (Tr., Motions, Nov. 6, 1964, p. 12). Thereafter, the transcripts of testi-

mony before the first grand jury were presented, along with the testimony of one witness, to a new grand jury (Tr., Motions, Nov. 6, 1964, p. 16). In August 1964, the new grand jury returned an indictment basically consolidating the prior two indictments and charging both petitioners Brown and Kent, as well as Whitmore,[2] with ten substantive offenses of offering for sale securities in IAT (nine counts) and Venezuela Mines, Inc. (one count) in a fraudulent scheme, in violation of 15 U.S.C. 77q(a), and a single count of conspiracy to commit the offense charged in the first ten counts (Pet. App. 21c–37c).

2. The evidence at trial showed that Kent (petitioner in No. 43 Misc.) heard about a possible timber investment venture in Surinam, South America, from one Joseph Harris. In the spring of 1959, Kent notified Harris that he had interested Whitmore in obtaining financing for the venture (Tr. 22, 770–773, 2449–2450, 2457, 2781). At the time, Whitmore worked for the Stanford Corporation (controlled by George Stanford), a broker-dealer in the District of Columbia, and petitioner Brown was counsel for the Stanford Corporation (Tr. 23–24, 617, 619–620). Stanford, Whitmore and Brown discussed the possibility of a public offering of securities in connection with the timber venture (Tr. 24, 26–29). Thereafter, Kent arranged a meeting in Miami attended by Kent, Whitmore and Harris, during which Harris was introduced to Brown over the telephone (Tr. 24–25, 777–780, 1002–1003, 2179). They discussed Harris' plan to

[2] Whitmore pleaded guilty before trial to count 2 of the indictment (J.A. 6).

acquire timber concessions in Surinam and a tentative understanding was reached that, provided some $850,000 could be raised, Brown, Whitmore and Kent would form an American company to develop the concessions (Tr. 777–780, 802–803, 827). Following further discussions Brown, in June, 1959, wrote to Harris to obtain fourteen items required to prepare a registration statement for filing with the Securities and Exchange Commission (J.A. 76–77; Tr. 26–30, 62–63).[3] When Harris was unable to furnish the necessary documents (Tr. 40–42, 774, 786), Stanford dropped the deal (Tr. 51–53).

In October 1959, Harris (and others) formed the Surinam Timber Corporation (Surtimco). Later that month Surtimco received a concession of 30,000 acres of timber from the Surinam government (Tr. 789, 1026–1027). In November 1959, Whitmore left the Stanford Corporation to spend full time on the timber underwriting (Tr. 43, 2538). Brown and Whitmore decided to raise $850,000 privately rather than through a public stock offering (Tr. 43–44, 2543). At Whitmore's request, Harris applied for an additional 100,000 acres of timber concessions for Surtimco. To do this Harris had to surrender all of his prior concessions (30,000 acres) and make a new application for 125,000 acres (Tr. 792, 1026–1027).

In December 1959, Brown and Whitmore formed the Inter-American Timber Company, a co-partner-

[3] These items included, among other things, the grant by the Surinam government of timber rights on 125,000 acres of virgin timber land; corporate documents and financial statements of the Surinam corporation acquiring the concessions; a title opinion on the land in question; etc. (J.A. 76–77).

ship with no assets (Tr. 44–45, Government Exhs. 4 and 5), which was incorporated in April, 1960 (Tr. 44, 2784). Brown controlled the venture. He opened the bank account on which he was the sole authorized signatory, arranged for telephone service, signed the lease, and kept all records including correspondence files, bank statements, bills, stock ownership records and minutes (Tr. 44–50, 204, 211, 216, 2562, 2786–2791). He held himself out variously as president, secretary-treasurer and director of IAT (Tr. 45–46, 1342, 2783; J.A. 77–78).

In mid-December Brown told Whitmore to begin selling IAT pre-incorporation stock (Tr. 44, 50–51, 2542–2543, 2783). In January 1960, he issued commission checks to Whitmore of $500, $750, and $2,500 for sales to IAT investors. For his own services, Brown issued a $2,500 check payable to his law firm and received 100,000 shares of IAT stock (Tr. 206–209, 2558, 2644–2646). Kent's request to Brown and Whitmore for a finder's fee for arranging the timber deal was delayed as premature, but Kent was told to stay in touch on it (Tr. 2180–2181).

On February 8, 1960, Harris received a notice from the Surinam government which specified a number of conditions to be met by Surtimco before it could obtain a concession of 25,000 acres of timber lands and left the possibility of extending the concession to 125,000 acres contingent upon satisfactory compliance with the conditions for the 25,000

acres (Tr. 805–806; J.A. 139–140).[4] Brown was well aware of these circumstances during the relevant period (Tr. 797–805, 808, 812–813, 1102–1103, 1271–1275, 2576).

In March 1960, at Brown's request Harris attended conferences at Brown's office in Washington, D.C., at which Whitmore and Kent were also present (Tr. 807–810, 812–813). During the conferences, Brown prepared in his own handwriting a draft of an IAT stock offering brochure dated March 1, 1960 (Tr. 813–814; Gov't Exh. 6). At that time, Brown had Surtimco's financial statement for 1959 that showed the company did not have any timber concessions (Tr. 815–818, 820–821; Gov't Exh. 47). However, Brown included an asset of $93,299,400 for standing timber in his handwritten draft (Gov't Exh. 6). Brown then prepared a typewritten version of the brochure on his own letterhead (Gov't Exh. 7). Kent, who was acting as an accountant for IAT, checked the financial statement in the brochure and made certain corrections (Tr. 1340–1343, 1347, 1380, 2183, 2312, 2491–2492). Brown rechecked it and made other revisions (Tr. 71–73, 77–78, 1339–1340, 1346–1347). Kent and Whitmore then had the brochure printed. The balance sheet of the printed version of the brochure indicated that IAT had assets including "Cash (Realized from sale of 137,500 shares at $1.00 per share) $137,500" and 125,000 acres of timber concessions from the Surinam government valued at

[4] Surtimco did not actually acquire the first 25,000 acre timber concession until August 29, 1960 (Tr. 1028; Def's Exh. 21A).

$9,322,940 (J.A. 81). IAT never realized more than about $13,000 from the sale of stock and never acquired any timber concessions (J.A. 77–78; Tr. 44, 90, 204, 1443, 2783–2784).[5] Brown sent the printed brochures from his office to prospective investors (Tr. 89–90, 167, 734), in some instances under his own covering letter (Tr. 2989–2994; Gov't Exh. 21 B, C, D).

In March 1960, a Dr. Steelman, who headed a group of investors Brown and Whitmore had been trying to interest in the timber venture (Tr. 367–368, 836), visited Brown's office. Brown told him that IAT had 125,000 acres of timber concessions valued at over $93,000,000, and gave Dr. Steelman two balance sheets which reflected these assets (J.A. 204, 205; Tr. 2082–2083).

In April 1960, Harris sent Whitmore a telegram worded as Whitmore had dictated over the telephone (J.A. 85; Tr. 109–110, 836–837). It stated that Surtimco had received $6,000,000 in timber orders backed by irrevocable letters of credit (J.A. 85). Surtimco had in fact no orders for timber (Tr. 110, 837–838). Brown and Kent knew the telegram was false (Tr.

[5] The balance sheets were marked "*pro forma*" to indicate that the books and records of the enterprise were adjusted to incorporate hypothetical transactions which had not occurred at the date of the balance sheet. However, a *pro forma* financial statement, such as this one, that does not disclose the assumptions on which it is based, is false and misleading (Tr. 1557, 1561–A, 1562, 1564, 3044–3045, 3055–3059, 3061–3062, 3069, 3073–3074). See *United States* v. *Benjamin*, 328 F. 2d 854, 861 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States*, 377 U.S. 953; *Leedy, Wheeler & Co.*, 16 S.E.C. 299, 307–308; Hills, *The Law of Accounting and Financial Statements*, 34–35 (1957).

109–119, 837–838). Brown had Western Union make up duplicate copies of the telegram which he inserted in the IAT brochures sent to prospective investors (Tr. 113, 2990; Gov't Exhs. 21C and 58). A person named Suggs invested $5,000 after being told by Brown and Whitmore that IAT stock was to be registered with the Securities and Exchange Commission and that it was then to be offered to the public at $5.00 a share (Tr. 98–102, 723–734). After Suggs received the brochure and telegram, he invested another $1,000 in IAT (Tr. 727–738; Gov't Exh. 42).

By July 1960, Brown, Whitmore and Kent had become interested in promoting a mining venture in Venezuela (Tr. 131–132, 2433–2434, 2443–2444, 2484, 2816). Venezuela Mines, Inc. founded by Brown was supposed to lease diamond concessions from a Venezuela corporation called Minera-Uraima. Brown became vice-president and director and kept all corporate and business records (Tr. 2426–2427, 2825, 2885, 2887). R. H. Whitmore & Co., an investment banking firm incorporated by Brown in April 1960, was to raise the $350,000 needed to acquire Minera-Uraima's purported diamond concessions (Tr. 124–125, 131–132, 1900, 2433–2434, 2443–2444, 2484, 2819–2820). Brown was an officer, director and stockholder of R. H. Whitmore & Co. and kept its corporate and business records (Tr. 124–125, 217, 2825, 2886, 2887; Gov't Exh. 13). R. H. Whitmore & Company's bank account was opened with money obtained from John Suggs, one of the IAT investors (Tr. 124–125).

In the latter part of 1960, Whitmore invited one Pfeiffer, an IAT investor, to invest in Venezuela

Mines stock. Pfeiffer was told that diamonds were so plentiful it was possible to rake them up by hand and that Venezuela Mines stock would be registered with the SEC within sixty to ninety days (Tr. 899). Kent, who was an experienced stock salesman, spoke to Pfeiffer on the telephone and echoed what Whitmore had said, adding that Venezuela Mines' diamond and gold concessions in Venezuela were worth millions of dollars (Tr. 900–903, 909, 976, 2119). Pfeiffer invested $5,000 in Venezuela Mines stock (Tr. 135–136, 908, 2656; Gov't Exhs. 61A, 61B and 61C). In December 1960, petitioner Kent, Whitmore and the principals of Minera-Uraima (Hea and Taube), met in Caracas to discuss a merger between Venezuela Mines and Minera-Uraima ~~(Hea and Taube), met in Caracas to discuss a merger between Venezuela Mines and Minera-Uraima~~ (Tr. 230–231, 986–987, 1880–1882, 1889, 1896, 1900, 1903–1906, 1912, 1925, 1932, 1949–1950, 1983; Gov't Exh. 23). The merger never took place, and Venezuela Mines never had any gold or diamond concessions in Venezuela (Tr. 230–231, 1485, 1488, 1537, 1574, 1880–1882, 1888–1890, 1896, 1903–1906, 1912, 1925, 1932–1933, 1949–1950, 1983, 2898). Nevertheless, Brown assured Pfeiffer that Venezuela Mines already owned the mineral concessions (Tr. 996–998).

In June 1960, before the trip to Caracas, Kent had copies of a stock offering brochure for Venezuela Mines printed (Tr. 1348, 1381; J.A. 85–125). Brown reviewed the brochure before it was printed (Tr. 2933). The brochure represented that Venezuela Mines owned Venezuela mineral concessions valued at more than $100,000,000. R. H. Whitmore & Co. was listed as an "independent" financial consultant to Vene-

zuela Mines. Brochures printed in March 1961 were sent to prospective investors by Brown (Tr. 1424, 2425, 2946–2954; Gov't Exhs. 22A, B, C).

ARGUMENT

1. There was no reason for the trial court to examine the grand jury minutes to determine whether it was supported by sufficient evidence (see Pet. 7–11). It is conceded that the grand jury which returned the original indictments heard extensive testimony. The second grand jury, which merely consolidated the two indictments, had before it, not only the transcripts of the "extensive testimony" taken at the prior grand jury, but an additional witness. This was sufficient. *Costello* v. *United States,* 350 U.S. 359.

Umans v. *United States,* certiorari granted February 27, 1967 (No. 967, O.T., 1966), involves a significantly different factual situation. There the evidence before the grand jury consisted of signed statements by persons who had not appeared before any grand jury. Here the grand jury which returned the consolidated indictment had the full transcript of the prior testimony as well as the testimony of a witness. As stated in *Costello* (350 U.S. at p. 363): "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits".

2. The fact the indictment did not name all of the co-conspirators—three of whom were subsequently identified in a bill of particulars—was not an infringement of the constitutional right to be tried on an indictment of a grand jury (Pet. 11–15). The perti-

nent part of the indictment charged as follows (J.A. 26):

> From on or about May 1, 1959 and continuing to on or about May 1, 1961 the defendants Darwin Charles Brown, Ralph H. Whitmore and M. Thomas Kent in the District of Columbia and within the jurisdiction of this Court and at other places to the Grand Jury unknown, would and did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other and with other persons to the Grand Jury unknown, to commit offenses against the United States, namely to violate Title 15, United States Code, Section 77q(a) * * *.

This is a precise statement of the offense charged and, when considered with the detailed overt acts, constitutes a plain, concise and definite statement of the essential facts necessary to apprise petitioner of the charges for preparation of his defense and to protect him from double jeopardy. Rule 7(c), F.R. Crim. P. The failure of the grand jury to name as "unindicted co-conspirators" persons known to them to have been connected in some way with the conspiracy does not constitute a fatal variance when at trial it appears that the unnamed unindicted persons are, in fact, co-conspirators. See *Fox* v. *United States*, 45 F. 2d 364, 365 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 599 (N.D. Ill.). Nor does a listing as co-conspirators in a bill of particulars of persons not named in the indictment constitute an amendment of the indictment. *E.g.*, *United States* v. *Comyns*, 248 U.S. 349, 353; *Dunlop*

v. *United States,* 165 U.S. 486, 491; *United States* v. *Lefkoff,* 113 F. Supp. 551, 555 (E.D. Tenn.). The names of such individuals are not descriptive of the offense charged. See *Prichard* v. *United States,* 181 F. 2d 326, 330–331 (C.A. 6), affirmed, 339 U.S. 974; *Fox* v. *United States,* 45 F. 2d 364, 365 (C.A. 7); *Didenti* v. *United States,* 44 F. 2d 537, 538 (C.A. 9); *Katz* v. *United States,* 273 Fed. 157, 159 (C.A. 1), certiorari denied, 257 U.S. 641. It is true that statements made by conspirators in furtherance of the conspiracy are binding upon each conspirator, but this is so even in the absence of a conspiracy count as proof on a substantive count. *United States* v. *Marchisio,* 344 F. 2d 653, 668 (C.A. 2). The evidence at trial determines the admissibility of such statements and acts. Since the names of unindicted co-conspirators were supplied by a bill of particulars petitioners cannot claim surprise.

3. Petitioners received concurrent suspended sentences on all counts on which they were convicted and a fine on only one count. Under the circumstances, there is no need to consider the question as to whether the trial court improperly refused to consolidate the ten substantive counts charging violations of 15 U.S.C. 17q(a) into a single count (Pet. 17–18).[6]

[6] The statute 15 U.S.C. 77q(a) defines the conduct prohibited as follows:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material

In any event, the contention is without merit. While the two district court cases on which petitioner relies (*United States* v. *Greenberg,* 30 F.R.D. 164 (S.D. N.Y.) and *United States* v. *Hughes,* 195 F. Supp. 795 (S.D. N.Y.)) do hold that each mailing will not necessarily constitute a separate offense,[7] they do not suggest that each offer or sale or transaction may not be pleaded in a separate count. Under the statute there is clearly a separate offense as to each person defrauded. And even where the same person is defrauded in several transactions, each sale or obtaining of money is a separate offense. This was recognized in the *Hughes* case on which petitioner relies (195 F. Supp. at 798). In each such instance there would be the separate impulse recognized in *United States* v. *Universal Corp.,* 344 U.S. 218. Here each count of the indictment charged a distinct transaction constituting a separate offense. There was thus no reason to consolidate the counts. See *Palmer* v. *United States,* 229 F. 2d 861, 867 (C.A. 10), certiorari denied, 350 U.S. 996; *Edens* v. *United States,* 239 F. Supp. 272 (E.D. Ark.); *United States* v. *Binstock,* 37 F.R.D. 13, 16 (S.D. N.Y.); *United States* v. *Bennett,* 36 F.R.D. 103, 107 (E.D. S.C.); *United States* v. *Van Allen,* 28 F.R.D. 329 (S.D. N.Y.).

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fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[7] There is no court of appeals decision to such effect. *United States* v. *Cashin,* 281 F. 2d 669 (C.A. 2), involved questions of venue, not consolidation of counts.

4. The trial court properly refused the requested instruction that the jury must acquit of all substantive and conspiracy counts if they found two separate and independent schemes and conspiracies, one in connection with the IAT corporation and the other in connection with Venezuela Mines (Pet. 15–17). If one conspiracy or scheme is charged and two are proved, the central figures common to each, such as petitioners here, are clearly not entitled to an acquittal. *E.g., United States* v. *Benjamin,* 328 F. 2d 854 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States,* 377 U.S. 953; *Monroe* v. *United States,* 234 F. 2d 49 (C.A. D.C.), certiorari denied, 352 U.S. 873; *United States* v. *Cohen,* 145 F. 2d 82, 88, 92 (C.A. 2), certiorari denied, 323 U.S. 799. Moreover, the evidence plainly showed that petitioners and Whitmore engaged in one overall scheme and conspiracy to defraud investors by the false and misleading representation that the companies had acquired foreign natural resource concessions for exploitation. While it is true that there were two promotions in progress during the course of the conspiracy, the same parties participated in both, and the same victims were urged to invest in both. The two promotions substantially overlapped in time. The jury found overt acts by Brown and Kent as to each promotion and both were found guilty of substantive counts involving both promotions. Thus, even if two conspiracies might have been found, petitioners were not prejudiced. See *Berger* v. *United States,* 295 U.S. 78, 82–83; *United*

States v. *Agueci*, 310 F. 2d 817, 826–828 (C.A. 2), certiorari denied, 372 U.S. 959.[8]

5. The claim that government counsel prejudicially relied on "repudiated direct testimony of key government witnesses" in summation (Pet. 18–20) is without merit. The transcript clearly reveals that the summation by government counsel was fully supported by the record. Thus, while it is true that Stanford vacillated on the stand as to whether Kent brought the timber venture to his attention (Tr. 685, 618–619, 689, 697), as argued by government counsel (Tr. 3107), the record was nonetheless replete with references substantiating the Government's contention, including Brown's own assertion that Stanford had told him that Kent had brought the venture to his attention (Tr. 25, 1002–1004, 2178–2179, 2781). Similarly, the statement of counsel in summation that Brown knew in February 1960 that Harris did not have concessions in Surinam (Tr. 3123) is completely supported by the record at trial, including the testimony of Harris on direct and cross-examination (Tr. 812–818, 826–827, 1093, 1097–1103, 1270–1271, 1293). Significantly, defense counsel did not object to those fragments of the prosecution's closing argument now characterized as misstatements.

[8] Petitioners' reliance (Pet. 15–16) on *Kotteakos* v. *United States*, 328 U.S. 750, is misplaced. The central figure who tied together the several conspiracies involved there was not before the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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